(19)

No. 05-259

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BURLINGTON NORTHERN SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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CERTIORARI GRANTED DECEMBER 5, 2005

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 05-259 Petition For A Writ Of Certiorari at the following pages.

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White v. *Burlington N. & Santa Fe Ry.*, 310 F.3d 443 (6th Cir. 2002) 84a-115a

White v. *Burlington N. & Santa Fe Ry.*, No. 99-2733-MI/Bre (W.D. Tenn. Nov. 16, 2000)..... 116a-122a

TENNESSEE WESTERN DISTRICT COURT

2:99-CV-02733

SHEILA WHITE,

Plaintiff,

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/20/1999	1	COMPLAINT Receipt #: 049701; Filing fee $ 150.00 ; Complaint based on Sexual Discrimination and Retaliation (YDS) (Entered: 08/23/1999)
		* * * *
08/28/2000	55	ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT by Judge Jon P. McCalla denying motion for summary judgment [36-1]; the pla has presented sufficient evidence to create a genuine issue of material fact as to whether dft undertook the employment action for legitimate, nondiscriminatory reasons or the reason proffered by dft are merely pretextual. Since there is a genuine issue of material fact, the Court FINDS that summary jgm on this point is inappropriate. Pla also claims that dft retaliated against her by wrongfully suspending her for insubordination . . . pla has shown a genuine issue

DATE	NO.	PROCEEDINGS
		of material fact on this point. Dft's Motion for Summary Judgment is DENIED. (cc: all counsel) (YDS) (Entered: 08/28/2000)
		* * * *
08/29/2000	60	MINUTES: Jury trial held 8/29/00; Day 1; voir dire by the Court/Counsel: 6 challenges exercised, 6 jurors excused for cause, 16 jurors unused, panel of 8 jurors selected/ administered impanelment oath Presiding Judge: McCalla PLA Atty: Don Donati/ Wm Ryan DFT Atty: Everett Gibson/Ralph Gibson C/R: Brenda Parker (YDS) (Entered: 08/31/2000)
08/30/2000	61	MINUTES:Civil Jury Trial Minutes; Day 2; panel of 8 jurors administered impanelment oath; court's preliminary jury instructions (9:35am); opening statements; pla's proof: witnesses sworn/exhibits admitted; pla - 11:30am; dft - 12:00pm; Shelia White (2:10pm); exhibits 1,2,3 Presiding Judge: McCalla PLA Atty: Don Donati/Wm Ryan DFT Atty: Ralph Gibson/Everett Gibson C/R: Brenda Parker (YDS) (Entered: 9/01/2000)
		* * * *
08/31/2000	64	MINUTES:Civil Jury Trial Minutes; Day 3; pla's proof: Shelia White (9:50am), Dr. Anise Golden (11:35am), Monica Lee (1:45pm), Margretha Franklin (2:00pm), Eddie Spears by deposition (2:40pm), pla rests @ 3:10pm; motion for jgm as a matter of law – Denied; dft's proof: Billy Ray

DATE	NO.	PROCEEDINGS
		Joyner (4:00pm) Presiding Judge: McCalla PLA Atty: Don Donati/Wm Ryan DFT Atty: Everett Gibson/Ralph Gibson C/R: Brenda Parker (YDS) (Entered: 09/01/2000)
09/01/2000	65	MINUTES: Civil Jury Trial Minutes; Day 4; dft's proof: witnesses sworn/exhibits admitted - Percy Sharkey, Marvin J. Brown, Dr. Ashok Rao – via deposition, Kathy B. McGee; dft rests; rebuttal proof: Ralph Ellis; charge conference; pla's motion for jgm as matter of law – Denied; dft's motion for jgm as matter of law – Denied; Presiding Judge: McCalla PLA Atty: Don Donati/ William Ryan DFT Atty: Everett Gibson/ Ralph Gibson C/R: Brenda Parker (YDS) (Entered: 09/06/2000)
		* * * *
09/05/2000	68	MINUTES: Civil Jury Trial; Day 5; preliminary matters re: amendments/changes to proposed jury instructions/verdict form; closing arguments; jury charge; deliberations began @ 2:04pm; hostile work environment claim - Denied; retaliation claim – Granted; claim for overtime pay – Denied; $3,250.00 awarded for medical expenses; $40,000 awarded for pain and suffering; jury polled; verdict announced @ 5:05pm; court excused/discharged jury on 9/5/00 @ 5:10p; pla will move for payment of fees and costs Presiding Judge: McCalla PLA Atty: Don Donati/Wm Ryan DFT Atty: Everett Gibson C/R: Brenda Parker (YDS) (Entered: 09/07/2000)

DATE	NO.	PROCEEDINGS
09/05/2000	69	VERDICT for plaintiff Shelia White against defendant Burlington Northern on retaliation claim (YDS) (Entered: 09/07/2000)
		* * * *
09/06/2000	70	JUDGMENT IN A CIVIL CASE: by Judge Jon P. McCalla . . . in accordance with the jury verdict. Re [69-1], rendered on 9/5/00, jgm is hereby entered for pla Shelia White and against dft for the sum of forty-three thousand two-hundred and fifty dollars ($43,250.00) terminating case (cc: all counsel) (YDS) (Entered: 09/07/2000)
		* * * *
11/16/2000	83	ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR NEW TRIAL.. by Judge Jon P. McCalla ... Dft's motion is DENIED in its entirety. The verdict rendered by the jury stands. [72-1] (cc: all counsel) (EHG) (Entered: 11/16/2000)
11/16/2000	84	ORDER GRANTING PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY FEES, COSTS & EXPENSEES... by Judge John P. McCalla ...the Courts awards plaintiff 80% of the $67,856.25 lodestar amount, or $54,285.00. ..[76-1] (cc: all counsel) (EHG) (Entered: 11/16/2000)
11/16/2000	85	JUDGMENT IN A CIVIL CASE: by Judge Jon P. McCalla re [84-1] ..Pla is awarded $54,285.00 in attorney's fees, costs, and expenses. (cc: all counsel) (EHG) (Entered: 11/16/2000)

DATE	NO.	PROCEEDINGS
		* * * *
12/15/2000	88	ORDER GRANTING PLAINTIFF'S MOTION TO ALTER OR AMEND THE COURT'S ORDER AWARDING ATTORNEY FEES, COSTS, AND EXPENSES... by Judge Jon P. McCalla ..Since the Court has already awarded to Plaintiff $54,285.00 in attorney's fees, the total amount awarded to Plaintiff is $58,340.28. [85-1] [86-1] (cc: all counsel) (EHG) (Entered: 12/18/2000)
12/15/2000	89	AMENDED JUDGMENT IN A CIVIL CASE: by Judge Jon P. McCalla re [85-1], re [88-1] (cc: all counsel) (EHG) (Entered: 12/18/2000)
		* * * *
12/15/2000	91	NOTICE OF APPEAL by defendant Burlington Northern from Dist. Court decision, [83-1] (EHG) (Entered: 12/18/2000)
12/21/2000	92	NOTICE OF APPEAL by defendant Burlington Northern from Dist. Court decision, [88-1] [89-1] [83-1] [84-1] [85-1] [70-1] (EHG) (Entered: 12/22/2000)
		* * * *
12/28/2000	95	PLAINTIFF'S NOTICE OF CROSS APPEAL by plaintiff Shelia White from Dist. Court decision [89-1] (EHG) (Entered: 01/03/2001)
		* * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

00-6780
01-5024

SHEILA WHITE,
Plaintiff-Appellee Cross-Appellant,
v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,
Defendant-Appellant Cross-Appellee.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/28/00	Civil Case Docketed. Notice filed by Appellant Burlington Northern. Transcript needed: y (pje) [00-6780]
	* * * *
4/26/01	BRIEF filed by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern. Copies: 1. Certificate of Service date 4/23/01. Number of Pages: 40. [00-6780, 01-5024] (pje) [00-6780, 01-5024]
	* * * *
5/25/01	PROOF BRIEF filed by Donald A. Donati and William B. Ryan for Appellee Cross-Appellant Sheila White. Copies: 1. Certificate of Service date 5/22/01. Number of Pages: 79. [00-6780, 01-5024] (pje) [00-6780 01-5024]
	* * * *

DATE	PROCEEDINGS
6/28/01	PROOF BRIEF filed by Ralph T. Gibson for Appellant Cross Appellee Bur ington Northern. Certificate of service date 6/22/01. Number of Pages: 43. [00-6780, 01-5024] (pje) [00-6780 01-5024]
	* * * *
7/9/01	FOURTH PROOF BRIEF filed by Donald A. Donati and William B. Ryan for Appellee Cross-Appellant Sheila White. Certificate of service date 7/6/01. Number of Pages: 28. Final fourth brief due 8/3/01. [00-6780, 01-5024] (pje) [00-6780 01-5024]
	* * * *
7/16/01	APPENDIX filed by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern. Copies: 25. Certificate of service date 7/13/01 [00-6780, 01-5024] (lak) [00-6780 01-5024]
	* * * *
9/11/02	CAUSE ARGUED on 9/11/02 by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern in 00-6780/01-5024. William B. Ryan for Appellee Cross-Appellant Sheila White in 00-6780/01-5024. before Judges Krupansky. Clay. Gwin. [00-6780, 01-5024] (me) [00-6780 01-5024]
	* * * *

DATE	PROCEEDINGS
11/13/02	OPINION filed: REVERSED and remanded to set aside the jury verdict, decision for publication pursuant to local rule 206 [00-6780, 01-5024]. Robert B. Krupansky, Eric L. Clay, Circuit Judges, James S. Gwin, Authoring Judge. Clay J. delivered a separate dissenting opinion. (yh) [00-6780 01-5024]
11/26/02	PETITION for en banc rehearing filed by Donald A. Donati and William B. Ryan for Appellee Cross-Appellant Sheila White . Certificate of service date 11/25/02. [00-6780, 01-5024] (blh) [00-6780 01-5024]
	* * * *
1/3/03	RESPONSE to a petition for en banc rehearing [2654369-1] previously filed by Donald A. Donati and William B. Ryan. Response filed by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern. Certificate of service date 1/2/03. [00-6780, 01-5024] (blh) [00-6780 01-5024]
2/11/03	ORDER filed granting petition for an banc rehearing [2654369-1] filed by Donald A. Donati and William B. Ryan to reinstate appeal. The previous decision and judgment of this court is vacated, the mandate is stayed. [00-6780, 01-5024] Boyce F. Martin, Chief Judge; Danny J. Boggs, Alice M. Batchelder, Martha C. Daughtrey, Karen N. Moore, R. G. Cole, Eric L. Clay, Ronald L. Gilman, Julia S. Gibbons, John M. Rogers, Circuit Judges. (blh) [00-6780 01-5024]

DATE	PROCEEDINGS
	* * * *
3/13/03	Supplemental brief filed by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern. Copies: 26. Certificate of service date 3/12/03. Number of Pages: 40. [00-6780, 01-5024] (pje) [00-6780 01-5024]
	* * * *
4/16/03	Supplemental brief filed by Donald A. Donati , William B. Ryan for Appellee Cross-Appellant Sheila White on 00-6780, 01-5024 . Copies: 25. Certificate of service date 4/14/03 . Number of Pages: 35. [00-6780, 01-5024] (lak) [00-6780 01-5024]
4/23/03	BRIEF filed by Ralph Lamar for Amicus Curiae Natl Employ Lawyers. Copies 25. Certificate of service date 4/21/03 . Number of Pages: 18. [00-6780, 01-5024] (lak) [00-6780 01-5024]
	* * * *
5/27/03	REPLY BRIEF to supplemental brief from Appellee Cross-Appellant filed by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern. Copies: 25. Certificate of service date 5/6/03. Number of Pages: 14. [00-6780, 01-5024] [00-6780, 01-5024] (blh) [00-6780 01-5024]
	* * * *

DATE	PROCEEDINGS
6/11/03	CAUSE REARGUED EN BANC by Bryan P. Neal for Appellant Cross-Appellee Burlington Northern in 00-6780/01-5024, William B. Ryan for Appellee Cross-Appellant Sheila White in 00-6780/01-5024, before Judge Martin, Krupansky, Boggs, Batchelder, Daughtrey, Moore, Cole, Clay, Gilman, Gibbons, Rogers, Sutton, Cook. [00-6780, 01-5024] (mc) [00-6780 01-5024]
	* * * *
4/14/04	OPINION filed: The district court's denial of defendant Burlington Northern & Santa Fe Railway's motion for judgment as a matter of law and the district court's award of attorney's fees to plaintiff Sheila White is AFFIRMED. The case is REMANDED for further proceedings as to punitive damages consistent with the opinion of this court, decision for publication pursuant to local rule 206 [00-6780, 01-5024]. Danny J. Boggs, Chief Judge, Boyce F. Martin, Robert B. Krupansky, Alice M. Batchelder, Martha C. Daughtrey, Karen N. Moore, R. G. Cole, Eric L. Clay, Ronald L. Gilman, Julia S. Gibbons, John M. Rogers, Jeffrey S. Sutton, and Deborah L. Cook, Circuit Judges. GIBBONS, J., announced the judgment and majority opinion of the en banc court on all issues. The entire en banc court joined Parts I (Background) and III (Attorney's Fees) of the majority opinion. Part II (Adverse Employment Action) of the majority opinion was joined by Boggs, C.J., and Krupansky, Batchelder, Gilman, Rogers, Sutton, and Cook, JJ., and Part IV (Punitive Damages) was joined

DATE	PROCEEDINGS
	by Martin, Daughtrey, Moore, Cole, Clay, Gilman, and Cook, JJ. Clay, J. (pp. 36-51), filed a separate concurring opinion joining Parts I, III, and IV of the majority opinion and writing separately as to Parts II and V, in which he joined by Martin, Daughtrey, Moore, and Cole, JJ. Sutton, J. (pp. 52-85), filed an opinion concurring in Parts I-III and dissenting Parts IV and V, in which he was joined by Boggs, C.J., and Krupansky, Batchelder, and Rogers, JJ. (pjc) [00-6780 01-5024]
4/14/04	JUDGMENT : AFFIRMED, : REMANDED . (pje) [00-6780 01-5024]
	* * * *
4/28/04	ADDITIONAL PETITION for en banc rehearing from en banc determination or alternatively motion to clarify opinion dated 04-14/04 filed by Ralph T. Gibson for Appellant Cross-Appellee Burlington Northern. Certificate of service date 4/27/04. [00-6780, 01-5024] (blh) [00-6780 01-5024]
	* * * *
5/3/04	TENDERED : response to petition for rehearing from en banc determination or alternatively motion to clarify opinion of 4/14/04 from William B. Ryan for Appellee Cross-Appellant Sheila White. [00-6780, 01-5024] (blh) [00-6780 01-5024]
	* * * *

DATE	PROCEEDINGS
4/26/05	ORDER. The petition for rehearing and the motion to clarify opinion are denied. The motion to stay the mandate is granted, and the motion to issue the mandate is denied. The mandate will issue after 90 days from the entry of this order if no petition for certiorari is filed. Decision not for publication. [00-6780, 01-5024] Danny J. Boggs, Chief Circuit Judge; Boyce F. Martin, Alice M. Batchelder, Martha C. Daughtrey, Karen N. Moore, R. G. Cole, Eric L. Clay, Ronald L. Gilman, Julia S. Gibbons, John M. Rogers, Jeffrey S. Sutton, Deborah L. Cook, Circuit Judges. (blh) [00-6780 01-5024]

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT COURT OF TENNESSEE
WESTERN DIVISION

[Filed Aug. 20, 1999]

Civil Action No. 99 2733 MI BRE

SHEILA WHITE,

Plaintiff.

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

COMPLAINT

I.

Introduction

COMES NOW Plaintiff, SHEILA WHITE, and brings this action against Defendant, THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY. As more specifically set forth below, Plaintiff asserts that she has been subjected to unlawful intentional discrimination on the basis of sex in violation of § 703 of Title VII of the Civil Rights Act of 1964, as amended and presently codified at 42 U.S.C. § 2000e-2(a)(1), and unlawful retaliation in violation of § 704 of Title VII of the Civil Rights Act of 1964, as amended and presently codified at 42 U.S.C. § 2000e-3.

II.

The Parties

1. Plaintiff, Sheila White, is a female citizen of the United States and of the State of Tennessee, residing at all relevant times at 3942 Maynard Drive, Memphis, Tennessee 38109.

2. Defendant, The Burlington Northern and Santa Fe Railway Company, is a corporation duly licensed and authorized to do business in the State of Tennessee, and operates a business facility located at 5280 E. Shelby Dr., Memphis, Tennessee 38118.

3. At all relevant times herein, Defendant has continuously had more than twenty (20) employees in each of twenty (20) calendar weeks in the preceding calendar year within the meaning of 42 U.S.C. § 2000e(b).

III.

Jurisdiction

4. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000e(5)(f)(3).

5. Plaintiff timely filed charges of discrimination with the Equal Employment Opportunity Commission alleging violations of Title VII by Defendant. Plaintiff has received Notices of Right to Sue which are attached herewith as "Exhibit A". All conditions precedent to the institution of this lawsuit have been fulfilled.

IV.

Statement of Facts

6. Plaintiff was hired by Defendant on or about June 23, 1997. Plaintiff was hired as a forklift driver to work in the maintenance of way department. At the time she was hired, Plaintiff had five (5) years of forklift operation experience.

7. On Plaintiff's first day of work she reported to Bill Joiner, who was to be Plaintiff's foreman. In front of at least four (4) male co-workers, Joiner proceeded to tell Plaintiff that if she came on her period or had any female difficulties he would make her job easier or lighter. Plaintiff was the only woman who worked in the maintenance of way department.

8. Thereafter, on an almost daily basis, Joiner repeatedly berated Plaintiff telling her that she should find another job because the railroad was not the place for women to work.

9. Before Plaintiff had completed her probationary period she was told by Joiner that the Roadmaster, Marvin Brown, wanted to disqualify her before she made her probation.

10. On one occasion in 1997, after a train had derailed at night in the company yard, Plaintiff was called to the scene of the derailment. When Joiner arrived at the scene, he told Plaintiff to shine her flashlight on him so he could see while he was urinating.

11. Joiner did not treat Plaintiff in the same equal manner as he treated men working for Defendant. For example, Joiner refused to give Plaintiff a raincoat to be used when she worked outside. While Joiner bought men new raincoats, Mr. Joiner told Plaintiff that he didn't see why she needed a raincoat.

12. Joiner gave Plaintiff a hard time whenever Plaintiff needed to take a restroom break. Joiner did not want to give Plaintiff a restroom break because it required him to make special stop for Plaintiff. Joiner did not give the men a hard time about taking restroom breaks.

13. When overtime work was available, Joiner would call the other men on Plaintiff's gang for overtime; however, Joiner would not call Plaintiff to work overtime.

14. Joiner told Plaintiff that she would need to provide him with a doctor's statement if she missed work. Joiner did not require the men to give a doctor's statement when they missed work. Plaintiff spoke out about this to Levert Deans, a foreman. Deans told Plaintiff that Roadmaster Brown and the Assistant Roadmaster, Mike Porter, made her give a doctor's statement because they considered her to be a troublemaker.

15. In September, 1997, Plaintiff reported to the Roadmaster, Marvin Brown, that she felt that Joiner was discriminating against her because she was a woman. Upon information and belief, Defendant investigated Plaintiff's allegations and suspended Bill Joiner for ten (10) days.

16. After Plaintiff reported her complaints against Joiner to the Roadmaster Brown, Brown told Plaintiff she would no longer be working as a forklift driver. Brown then demoted Plaintiff to the position of trackman. The work as a trackman was heavy, dirty, outside work, and is a lower position than a forklift driver. Defendant demoted Plaintiff to this position in retaliation for her complaints.

17. When Bill Joiner came back from his suspension Plaintiff was placed under Joiner's supervision.

18. On October 10, 1997, Plaintiff filed a Charge of Discrimination (Charge # 250980041) with the EEOC alleging sexual discrimination and retaliation. After Plaintiff filed her charge with the EEOC, Joiner was sent to Marion, Arkansas to work.

19. After Joiner left, Plaintiff's new foreman was Percy Sharkey. While working under Sharkey, Plaintiff was constantly being nagged by Sharkey. Sharkey told Plaintiff that if she could not handle the work she should just quit or go home.

20. On December 4, 1997, Plaintiff filed a second Charge of Discrimination (Charge # 250980247) with the EEOC alleging that she continued to be discriminated against on the basis of her sex and in retaliation for filing the prior charge of sex discrimination against Defendant.

21. In the late fall of 1997, Sharkey told Plaintiff that she would have to go to Blytheville, Arkansas to work. When Plaintiff questioned Sharkey as to the reason she was being sent to Blytheville, Sharkey told Plaintiff that they are trying

to get rid of you because you are a troublemaker. Sharkey then told Plaintiff that he was just doing what he had been told to do.

22. While working in Blytheville, Plaintiff performed her job in a professional and competent manner. Without any basis in fact, Plaintiff was told by Sharkey that she was being sent home to Memphis for insubordination. Roadmaster Brown placed Plaintiff on suspension on or about December 11, 1997.

23. On December 15, 1997, Plaintiff filed a third Charge of Discrimination (Charge # 250980288) with the EEOC alleging she had been suspended because of her sex and in retaliation for filing previous charges.

24. Plaintiff was off work for approximately three (3) months while her Union was investigating her suspension. Plaintiff then received a call from Brown and Brown asked Plaintiff how soon could she get back to work. Plaintiff resumed working in January, 1998.

25. Plaintiff resumed working as a trackman under Percy Sharkey.

26. As a result of the repeated and constant beratement by Brown and Sharkey, Plaintiff went to see Annice Golden, a clinical psychologist, in February, 1998. Accordingly, Plaintiff went out on sick leave.

27. Plaintiff stayed on sick leave through December, 1998. At that time, Plaintiff was notified that she was being fired for failing to provide Defendant with a leave of absence report.

28. On April 21, 1999, Plaintiff filed another Charge of Discrimination (Charge # 250990827) with the EEOC alleging she had been fired for filing her previous charges.

29. As a result of Defendants' discrimination and retaliation against Plaintiff, Plaintiff has suffered severe injury including, but not limited to, loss of income and benefits. In

addition, Plaintiff has suffered emotional distress, embarrassment, mental anguish, loss of enjoyment of life, insomnia, humiliation and other non-pecuniary losses.

30. Defendant's action and inactions resulted in discrimination against Plaintiff on the basis of her sex in violation of Title VII. The effect of Defendant's employment policies and practices was to discriminate against Plaintiff in way that jeopardized her job and deprived her of equal employment opportunities. Defendants action and inactions created a hostile work environment resulting in discrimination against plaintiff on the basis of sex in violation of Title VII. Further, Defendant's action and inactions constituted retaliation against Plaintiff in violation of Title VII.

31. The unlawful actions of Defendant complained of above were willful, malicious and with complete and reckless disregard for Plaintiff's rights under the law. In addition, Defendant failed to act in good faith when it investigated Plaintiff's complaints. As such, punitive damages are appropriate.

V.

Cause of Action

32. Plaintiff incorporates paragraphs 1 through 31 above as though specifically set forth herein, and for cause of action states as follows:

33. Defendant's termination of Plaintiff's employment with Defendant constitutes unlawful discrimination on the basis of sex in violation of § 703 of the Civil Rights Act of 1964, as amended and codified at 42 U.S.C. § 2000e-2(a)(1). More specifically, 1) Plaintiff was treated differently than male co-workers who were similarly situated; and 2) Defendant's actions created a hostile work environment which was sufficiently severe and pervasive to alter the conditions of Plaintiff's employment and created an abusive working environment.

34. Defendant's termination of Plaintiff's employment with Defendant constitutes unlawful retaliation in violation of § 704 of the Civil Rights Act of 1964, as amended and codified.

VI.

Prayer for Relief

WHEREFORE, premises considered, Plaintiff respectfully prays that the Court cause service to issue in this case and set this matter for trial. Upon a verdict thereon, Plaintiff prays the Court grant the following relief:

1. An award of backpay, lost benefits, front pay, and other equitable relief;

2. An award of compensatory and punitive damages in the amount of $300,000.00 for sex discrimination in violation of Title VII;

3. An award of compensatory and punitive damages in the amount of $300,000.00 for sex discrimination in violation of Title VII;

4. Prejudgment and post-judgment interest at the legal rate as determined by the Court;

5. An award of all costs, disbursements, reasonable attorney's fees, and expert witness fees;

6. Such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED,

DONATI LAW FIRM, LLP

By: /s/ Donald A. Donati
Donald A. Donati
Reva M. Kriegel
Attorneys for Plaintiff
1545 Union Ave.
Memphis, TN 38104
901/278-1004

NOTICE OF RIGHT TO SUE

(Conciliation Failure)

To:	From:
Sheila White	EQUAL EMPLOYMENT
3942 MAYNARD DRIVE	OPP. COMM.
MEMPHIS, TN 38109	Memphis District Office
	1407 Union Ave. Suite 621
	Memphis, TN 38104

□ *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))*

Charge Number	EEOC Representative	Telephone Number
250980041	Celia Liner, Sr. Tr. Atty	(901) 544-0075

TO THE PERSON AGGRIEVED:

This notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

—NOTICE OF SUIT RIGHTS—

(See additional information attached to this form)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit

must be filed WITHIN 90 DAYS from your receipt of this Notice; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

If you file suit based on this charge, please send a copy of your court complaint to this office.

On Behalf of the Commission

/s/ W.S. Grabon, JUL 14 1999
W.S. Grabon, Director *(Date)*

Enclosure(s)

cc: BURLINGTON NORTHERN RAILROAD
5280 E SHELBY DR
MEMPHIS, TN 38118

DISMISSAL AND NOTICE OF RIGHTS

To:	From:
Sheila White	E.E.O.C.
3942 MAYNARD DRIVE	Memphis District Office
MEMPHIS, TN 38109	1407 Union Ave. Suite 621
	Memphis, TN 38104

☐ *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))*

Charge Number	EEOC Representative	Telephone Number
250980247	Karen Booker	(901) 544-0154

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

☐ Your allegations did not involve a disability that is covered by the Americans with Disabilities Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

☐ We cannot investigate your charge because it was not filed within the time limit required by law.

☐ Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge.

☐ While reasonable efforts were made to locate you, we were not able to do so.

☐ You had 30 days to accept a reasonable settlement offer that affords full relief for the harm you alleged.

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude

that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☐ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other *(briefly state)* _____

—NOTICE OF SUIT RIGHTS—

(See additional information attached to this form)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed WITHIN 90 DAYS of your receipt of this Notice; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

If you file suit based on this charge, please send a copy of your court complaint to this office.

On Behalf of the Commission

/s/ W.S. Grabon, MAY 24 1999
W.S. Grabon, Director *(Date)*

Enclosure(s)

cc: BURLINGTON NORTHERN RAILROAD
5280 EAST SHELBY DRIVE
MEMPHIS, TN 38118

NOTICE OF RIGHT TO SUE

(Conciliation Failure)

To:	From:
Sheila White	EQUAL EMPLOYMENT
3942 MAYNARD DRIVE	OPP. COMM.
MEMPHIS, TN 38109-0000	Memphis District Office
	1407 Union Ave. Suite 621
	Memphis, TN 38104

□ *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))*

Charge Number	EEOC Representative	Telephone Number
250980288	Celia Liner, Sr. Tr. Atty	(901) 544-0075

TO THE PERSON AGGRIEVED:

This Notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

—NOTICE OF SUIT RIGHTS—

(See additional information attached to this form)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit

must be filed WITHIN 90 DAYS from your receipt of this Notice; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

If you file suit based on this charge, please send a copy of your court complaint to this office.

On Behalf of the Commission

/s/ W.S. Grabon, JUL 14 1999
W.S. Grabon, Director *(Date)*

Enclosure(s)

cc: BURLINGTON NORTHERN RAILROAD
5280 E. SHELBY DRIVE
MEMPHIS, TN 38118-0000

DISMISSAL AND NOTICE OF RIGHTS

To:	From:
Sheila White	E.E.O.C.
3942 MAYNARD DRIVE	Memphis District Office
MEMPHIS, TN 38109	1407 Union Ave. Suite 621
	Memphis, TN 38104

☐ *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))*

Charge Number	EEOC Representative	Telephone Number
250990827	Karen Booker	(901) 544-0154

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

☐ Your allegations did not involve a disability that is covered by the Americans with Disabilities Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

☐ We cannot investigate your charge because it was not filed within the time limit required by law.

☐ Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge.

☐ While reasonable efforts were made to locate you, we were not able to do so.

☐ You had 30 days to accept a reasonable settlement offer that affords full relief for the harm you alleged.

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude

that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☐ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other *(briefly state)* _____

—NOTICE OF SUIT RIGHTS—

(See additional information attached to this form)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed WITHIN 90 DAYS of your receipt of this Notice; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

If you file suit based on this charge, please send a copy of your court complaint to this office.

On Behalf of the Commission

/s/ W.S. Grabon, MAY 24 1999

W.S. Grabon, Director *(Date)*

Enclosure(s)

cc: BURLINGTON NORTHERN RAILROAD
5280 E SHELBY DR
MEMPHIS, TN 38118

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT COURT OF TENNESSEE
WESTERN DIVISION

Civil Action No. 99-2733 MI/Bre

SHEILA WHITE,

Plaintiff,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

ADDENDUM TO COMPLAINT

Pursuant to past experience with the Court, Plaintiff's counsel hereby submits an addendum to Plaintiff's Complaint and attached the following Charges of Discrimination filed with the EEOC:

Charge No. 250980041

Charge No. 250980247

Charge No. 250980288

Charge No. 250990827

RESPECTFULLY SUBMITTED,
DONATI LAW FIRM, LLP

By: /s/ Donald A. Donati
Donald A. Donati
Reva M. Kriegel
1545 Union Ave.
Memphis, TN 38104
901/278-10004
Attorneys for Plaintiff

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See Privacy Act Statement before completing this form.

AGENCY: ☐ FEPA ☒ EEOC

CHARGE NUMBER: 250980041

Tennessee Human Rights Commission and EEOC
State or local Agency, if any

NAME (indicate Mr., Ms., Mrs.): Ms. Sheila White

HOME TELEPHONE (Include Area Code): (901) 758-6558

STREET ADDRESS: 1992 Maynard Drive, Memphis, TN 38109

CITY, STATE AND ZIP CODE:

DATE OF BIRTH: 11/15/56

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: Burlington Northern Railroad

NUMBER OF EMPLOYEES, MEMBERS: Cat D (501 +)

TELEPHONE (Include Area Code): (901) 369-6125

STREET ADDRESS: 5290 E Shelby Dr. Memphis, TN 38118

CITY, STATE AND ZIP CODE:

COUNTY: 157

NAME:

TELEPHONE NUMBER (Include Area Code):

STREET ADDRESS:

CITY, STATE AND ZIP CODE:

COUNTY:

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es).)

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☒ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST: 07/02/97
LATEST: 09/29/97
☒ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s))

On September 16, 1997, I reported my Foreman for sexual harassment. On September 26, 1997, I was advised that the alleged harasser had been suspended without pay for ten (10) days, as a result of the company's investigation. I was also advised that my position, Forklift Operator, was being phased out and/or placed up for bids, as of September 29, 1997. On September 29, 1997, I was placed in the position of Trackman and another employee was placed in the position of Forklift Operator. Finally, I was informed that I would remain under the supervision of the alleged harasser. I have worked for the above-named company since June 23, 1997.

I believe that I have been discriminated against because of my sex (female) and in retaliation for reporting sexual harassment, in violation of Title VII of the Civil Rights Act of 1964, as amended.

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Charging Party (signature)

NOTARY (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT: Sheila White

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year)
10, October 1997

EEOC Form 5 (Rev. 04/97)

RESPONDENT'S COPY

BEST AVAILABLE COPY

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See Privacy Act Statement before completing this form.

AGENCY: ☐ FEPA ☒ EEOC

CHARGE NUMBER: 250980247

Tennessee Human Rights Commission
State or local Agency, if any

and EEOC

NAME (Indicate Mr., Ms., Mrs.): Ms. Sheila White

HOME TELEPHONE (Include Area Code): (901) 798-6558

STREET ADDRESS: 1942 Maynard Drive, Memphis, TN 38109

CITY, STATE AND ZIP CODE:

DATE OF BIRTH: 11/15/56

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: Burlington Northern Railroad

NUMBER OF EMPLOYEES, MEMBERS: Cat D (501 +)

TELEPHONE (Include Area Code): (901) 369-6166

STREET ADDRESS: 5250 East Shelby Drive, Memphis, TN 38118

CITY, STATE AND ZIP CODE:

COUNTY: 157

NAME:

TELEPHONE NUMBER (Include Area Code):

STREET ADDRESS:

CITY, STATE AND ZIP CODE:

COUNTY:

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es)):

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☒ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST: 07/02/97
LATEST: 12/04/97
☒ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I am being subjected to unequal terms and conditions of employment with respect to restrooms, supervision and constant surveillance. I was drafted for an undesirable job assignment. I am classified as a Trackperson and have been employed since June, 1997.

I believe I am being discriminated against because of my sex (female) and in retaliation for filing a prior charge of discrimination (250980041) against my employer. I believe I am being dsicriminated against because of my sex because there are no female restroom facilities in my work area and the employer has refused to make any available. I am being retaliated by being required to obtain approval from the Roadmaster prior to taking a day off. The Roadmaster keeps me under surviellance by calling my foreman daily to see if I am present and to check on my activities. No other employee is being subject to similar terms and conditions of employment. Additionally, I was involuntarily selected for a job assignment in Blytheville, Ark., over less senior employees.

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Charging Party (Signature)

NOTARY (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT: Sheila White

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Month, day, and year): 4th December, 1997 Earl Cox

EEOC Form 5 (Rev. 06/94)

CHARGING PARTY COPY

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY: [ ] FEPA [X] EEOC

CHARGE NUMBER: 250980288

Tennessee Human Rights Commission and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.): Ms. Sheila White

HOME TELEPHONE (Include area code): (901) 758-6558

STREET ADDRESS: 3942 Maynard Drive, Memphis, TN 38109

CITY, STATE AND ZIP CODE:

DATE OF BIRTH: 11/15/56

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: Burlington Northern Railroad

NUMBER OF EMPLOYEES, MEMBERS: Cat D (501 +)

TELEPHONE (Include Area Code): (901) 369-6125

STREET ADDRESS: 5280 E. Shelby Drive, Memphis, TN 38118

CITY, STATE AND ZIP CODE:

COUNTY: 157

NAME:

TELEPHONE NUMBER (Include Area Code):

STREET ADDRESS:

CITY, STATE AND ZIP CODE:

COUNTY:

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es).)

[ ] RACE [ ] COLOR [X] SEX [ ] RELIGION [ ] NATIONAL ORIGIN
[X] RETALIATION [ ] AGE [ ] DISABILITY [ ] OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST: 12/11/97
LATEST: 12/11/97
[ ] CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s).)

On December 11, 1997, I was put on suspension pending an investigation. I hold the position of Trackman/Trackperson. I have been employed with the above named employer since June 23, 1997.

The reason given for the suspension was that I was insubordinate.

I believe I was put on suspension because of my sex, female and in retaliation for filing a previous charge of discrimination (250-98-0041), in violation of Title VII of the Civil Rights Act of 1964, as amended.

[ ] I want this charge filed with both the EEOC and the State or local agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Charging Party (Signature):

NOTARY (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT: Sheila White 12-12-97

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year): 12/12/97

EEOC Form 5 (Rev. 06/92)

28

CHARGING PARTY COPY

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY: ☐ FEPA ☒ EEOC

CHARGE NUMBER: 250990827

Tennessee Human Rights Commission and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.): Ms. Sheila White

HOME TELEPHONE (Include Area Code): (901) 786-9141

STREET ADDRESS, CITY, STATE AND ZIP CODE: 3942 Maynard Drive, Memphis, TN 38109

DATE OF BIRTH: 11/15/1956

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: BURLINGTON NORTHERN RAILROAD

NUMBER OF EMPLOYEES, MEMBERS: Cat D (501 +)

TELEPHONE (Include Area Code): (901) 369-6118

STREET ADDRESS, CITY, STATE AND ZIP CODE: 5401 E SHELBY DR, Memphis, TN 38118

COUNTY: 157

NAME:

TELEPHONE NUMBER (Include Area Code):

STREET ADDRESS, CITY, STATE AND ZIP CODE:

COUNTY:

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es).)

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☒ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST: 09/29/1997
LATEST: 12/07/1998
☐ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s).)

I was discharged from the position of Trackperson on December 7, 1998. I had worked for the above-named company since June 23, 1997.

I was advised that I was being discharged for failing to request an extension of my original Leave of Absence which ended September 30,1998.

I believe that I have been discriminated against because of my sex (female) and in retaliation for reporting sexual harassment in September of 1997 and in retaliation for filing EEOC charges 250-98-0041, 250-98-0247 & 250-98-0288.

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Charging Party (Signature):

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT: Sheila D. White

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year): 21 April 1999 Karen Parker

EEOC Form 5 (Rev. 06/82)

CHARGING PARTY COPY

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT COURT OF TENNESSEE
WESTERN DIVISION

[Filed Aug. 25, 2000]

Civil Action No. 99 2733 Ml Bre

SHEILA WHITE,

Plaintiff,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

JOINT PRETRIAL ORDER

Come now the parties and submit the following joint pre-trial order in this action.

Appearances for the Parties:

For Plaintiff:

Donald A. Donati
William B. Ryan
Donati Law Firm, LLP
1545 Union Avenue
Memphis, Tennessee 38104
901/278-1004

For Defendant:

Everett B. Gibson
Ralph T. Gibson
Bateman, Gibson & Childers, LLC
65 Union Avenue, Suite 1010
Memphis, TN 38103
901/843-2466

I. Jurisdiction

The parties stipulate to the jurisdiction of this Court.

II. Pending Motions

A motion summary judgment and a motion in limine have been filed by Defendant.

III. Contention of the Parties

A. Plaintiff's Contentions

Plaintiff contends that she was discriminated against by the Defendant because of her sex in violation of Title VII. Plaintiff further contends that after she opposed this discrimination she was retaliated against by Defendant, in violation of Title VII, when she was transferred and suspended.

Defendant is a corporation which operates railway transportation company. Plaintiff began her employment with Defendant on June 23, 1997. Plaintiff worked at the Tennessee Yard under Roadmaster Marvin Brown. Plaintiff previously worked at Schering Plough where she had gained forklift operation experience. Plaintiff's job title upon her hiring was that of track laborer. However, Plaintiff did not perform the duties of track laborer until she complained about sexual discrimination and sexual harassment. Instead, Plaintiff was initially assigned by Roadmaster Marvin Brown to operate a forklift and clean up around the material complex.

From June 23, 1997 to October 9, 1997, Plaintiff worked under the supervision of Bill Joiner. Bill Joiner held the belief that women should not work on the railroad. Joiner treated Plaintiff differently because she was a woman including denying her overtime. Joiner made lewd comments and acted inappropriately towards Plaintiff. Joiner and other male employees stated to Plaintiff that women should not work at the rail yard. There existed at the railroad a heavy anti-women animus.

Plaintiff complained to Defendant about sexual discrimination and sexual harassment on September 16, 1997. Defendant conducted an investigation concerning Plaintiff's allegation on September 22-23, 1997. Defendant found that Bill Joiner had behaved inappropriately and subsequently suspended Joiner for ten days without pay. Defendant also required him to attend EEO training. On September 26, 1997, Roadmaster Brown removed Plaintiff from the forklift position in retaliation for complaining about discrimination.

Plaintiff continued to work under Bill Joiner until October 9, 1997. Joiner then transferred to Marion, Arkansas. Plaintiff filed her first charge of sex discrimination and retaliation with the EEOC on October 10, 1997. Percy Sharkey then became Plaintiff's foreman. On December 4, 1997, Plaintiff filed a second charge of discrimination with the EEOC alleging sex discrimination and retaliation. On December 11, 1997, Plaintiff was working in Blytheville, Arkansas under her foreman Percy Sharkey. On that date Plaintiff was suspended for insubordination. Roadmaster Marvin Brown made the decision to suspend Plaintiff without pay on December 11, 1997. Plaintiff filed a third charge of discrimination and retaliation with the EEOC on December 15, 1997. Subsequently a hearing was held pursuant to the collective bargaining agreement. Plaintiff was found not to have been insubordinate and Plaintiff was reinstated to her position on or about January 16, 1998. Plaintiff was paid back pay that she lost as a result of her suspension. Plaintiff continued to work under Percy Sharkey until February 17, 1998 when she was placed on medical leave by D. Annice Golden, Ph.D., Plaintiff's psychologist because of depression caused by the action of the Defendant.

B. Defendant's Contentions

Plaintiff began working for BNSF as a maintenance of way track laborer on June 23, 1997. On October 10, 1997, plaintiff filed her first charge of discrimination against BNSF with the

EEOC. In her first charge of discrimination, plaintiff alleged that she had been sexually harassed by her foreman, Bill Joiner, that her position in the maintenance of way department had been changed from the position of forklift operator to another position in the maintenance of way department, and that she remained under the supervision of Mr. Joiner. According to plaintiff's own deposition, however, BNSF promptly and appropriately responded to plaintiff's complaints about Mr. Joiner by suspending him for 10 days without pay and by requiring Mr. Joiner to attend EEO training as directed by the BNSF Human Resources Department. Moreover, plaintiff remained a trackman, was not given a reduction in pay, and was only given a different job duty within the position of track person. Finally, plaintiff admitted that she had no more problems with Mr. Joiner after he returned from his suspension and that Mr. Joiner was transferred to a different gang in another city just a few days after he came back from his suspension.

Plaintiff has identified only two direct comments that were made to her by her male coworkers or supervisors while she was actively employed by BNSF that were improper. Her other allegations regarding the comments made concerning the general feeling about women on the railroad were not made directly to her. Accordingly, Plaintiff will be unable to establish the hostile work environment element of her claims.

Plaintiff's second charge of discrimination alleged that she was subjected to discrimination because there were no female restroom facilities for the maintenance of way department at the Tennessee Yard in Memphis, the roadmaster required plaintiff to seek approval from him personally before she could take a day off and checked up on her attendance on a daily basis, and the plaintiff was involuntarily selected for a job assignment in Blytheville, Arkansas, over less senior employees. The foregoing EEOC charge was filed by plaintiff on December 4, 1997, and plaintiff was suspended for insubordination on December 11, 1997.

BNSF made accommodations to the maintenance of way restroom facilities at the Tennessee Yard in Memphis; however, because plaintiff was suspended on December 11, 1997 and plaintiff never returned to work in the Tennessee Yard before her termination, plaintiff did not know what accommodations had been made to the restroom facilitates [sic]. Moreover, plaintiff admitted that her entire track gang was sent to Blytheville, Arkansas and that under the Collective Bargaining Agreement Blytheville, Arkansas, was part of her territory. Finally, plaintiff's absenteeism for the short duration she was actively employed at BNSF gave the roadmaster, Marvin Brown, cause for concern such that he monitored plaintiff's attendance. Mr. Brown testified in his deposition that any employee with the absenteeism problems plaintiff had were monitored in the same fashion.

Plaintiff's third charge of discrimination against BNSF was filed on December 15, 1997. In that charge, plaintiff claimed that BNSF's action in suspending plaintiff for insubordination was really in retaliation for the two previous charges that plaintiff had filed against defendant. The record, however, reflects that plaintiff's foreman at that time, Percy Sharkey, felt that plaintiff was being insubordinate for failing to follow instructions. Mr. Sharkey, who no longer works for BNSF, testified in his deposition that he felt plaintiff was being insubordinate, notwithstanding the fact that in the union investigation it was ultimately found that plaintiff should not have been suspended. In any event, plaintiff was returned to her position with all back pay, including any overtime she would have received.

IV. Stipulated Facts

The parties have agreed to stipulate to the following facts:

1. Defendant hired Plaintiff on June 23, 1997.

2. Plaintiff's job title was track laborer.

3. Plaintiff complained to Defendant about sexual discrimination and sexual harassment on September 16, 1997.

4. Bill Joiner was suspended without pay for ten days and required to attend EEO training.

5. Plaintiff filed a charge of discrimination with the EEOC on October 10, 1997.

6. Plaintiff filed a second charge of discrimination with the EEOC on December 4, 1997.

7. Defendant removed Plaintiff from service on December 11, 1997.

8. Defendant's stated reason for removing Plaintiff was insubordination.

9. Plaintiff did not receive pay while she was on suspension.

10. Plaintiff filed a third charge of discrimination and retaliation on December 15, 1997.

11. Plaintiff was reinstated to her position on or about January 16, 1998, and was given all back pay, including all overtime pay she might have received.

12. Plaintiff went on medical leave on February 17, 1998.

13. Parties agree to stipulate to the authenticity of all documents provided in discovery process, but reserve all other objections for trial.

V. Contested Issues of Fact

Whether Plaintiff was exposed to a hostile work environment based on sex in violation of Title VII.

Whether Defendant discriminated against Plaintiff in the terms and conditions of her employment based upon sex in violation of Title VII.

Whether Defendant retaliated against Plaintiff, in violation of Title VII, after she protested discrimination.

Whether Bill Joiner was Plaintiff's supervisor.

Whether the change in Plaintiff's job duties was an adverse employment decision.

Whether Defendant's articulated reasons for transferring Plaintiff and removing Plaintiff from service are pretextual.

If Plaintiff prevails on any of her claims, what equitable relief is Plaintiff entitled to receive?

If Plaintiff prevails on any of her claims, is Plaintiff entitled to receive compensatory damages. If yes, in what amount?

If Plaintiff prevails on her claims, is Plaintiff entitled to receive punitive damages? If yes, in what amount?

VI. Contested Issues of Law

Whether Plaintiff has established a *prima facie* case of sex discrimination.

Whether Plaintiff has established a *prima facie* case of retaliation.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT COURT OF TENNESSEE
WESTERN DIVISION

[Aug. 28, 2000]

No. 99-2733 Ml/Bre

SHEILA WHITE,

Plaintiff,

vs.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant's Motion for Summary Judgment. For the reasons stated below, the Motion is DENIED.

Background

This claim arises under 42 U.S.C. §§ 2000e-2(a) and 2000e-3(a), parts of legislation commonly referred to as "Title VII." Plaintiff Sheila White alleges that Defendant Burlington Northern and Santa Fe Railway Company ("BNSF") (1) discriminated against her through a hostile work environment and (2) retaliated against her after she complained to management about the alleged discrimination and filed complaints with the Equal Employment Opportunity Commission (the "EEOC").

Defendant hired Plaintiff on June 23, 1997 for the job position of "Track Laborer" with Gang 321 in the Main-

tenance of Way Department. Plaintiff was the only female member of Gang 321 at the time of hiring and throughout the time period involved in this case. The primary duties of this position related to the maintenance of the railroad track. However, because of prior forklift experience, Plaintiff began work as a forklift operator under Gang 321 Foreman Bill Joiner. Plaintiff operated a forklift and had the general task of keeping the material complex in a clean condition.

Over the course of the next three months, Plaintiff alleges certain instances of harassment and discrimination by Joiner. Specifically, Plaintiff alleges that:

(1) In an orientation meeting, Joiner stated to Plaintiff in front of male co-workers that she should let him know when she came on her period so that he could lighten her workload;

(2) On an almost daily basis, Joiner made comments to Plaintiff that the railroad is not a place for women to work;

(3) Joiner intentionally failed to offer overtime work to Plaintiff because she is female;

(4) While working on a job, Joiner requested that Plaintiff hold a flashlight on him while he urinated;

(5) Joiner failed to provide Plaintiff with a raincoat when raincoats were provided to her male co-workers; and

(6) Joiner required Plaintiff to provide a doctor's statement if she missed work, but he did not require doctor's statements from her male co-workers.

Plaintiff also alleges that Defendant discriminated against her by not providing adequate bathroom facilities. Specifically, Plaintiff alleges that the facilities made available to her were unisex, did not have functioning locks, and as a result, her co-workers often entered while she was inside the bathroom.

Plaintiff complained to Joiner's supervisor, Roadmaster Marvin Brown, about Joiner's conduct on September 16, 1997. After an investigation by Brown, Joiner was suspended for 10 days. Once Joiner returned from his suspension, he served as foreman over Plaintiff for approximately one to two weeks before accepting a transfer.

While Plaintiff does not allege any discriminatory or harassing conduct by Joiner after the suspension, she does allege that Brown changed her job duties from a forklift operator to the more physically demanding duties of a track laborer on September 20, 1997. In this new position, Plaintiff worked on the actual track maintenance and repair work. This change did not constitute an official change in job title, but did reflect a change of duties. Defendant alleges that this change was the result of terms under a collective bargaining agreement which required Defendant to place a more senior employee in the forklift operator position. Plaintiff contends that retaliation was the true intent behind the change.

Approximately two weeks later, on October 10, 1997, Plaintiff filed her first charge of discrimination with the EEOC. Her complaint alleged that (1) she had been subject to harassment from Joiner, (2) that the change in job duties from forklift operator to track laborer was taken in retaliation for complaining about the harassment, (3) that she remained under the supervision of Joiner, and (4) that she was not offered overtime work in the same manner as her male co-workers.

On the same day that Plaintiff filed her complaint with the EEOC and Joiner was transferred to a different location, Percy Sharkey became Foreman over Gang 321. While Plaintiff alleges that Sharkey "nagged her," she does not allege any specific instances of harassment or discrimination by Sharkey. She does allege, however, that around December 8, 1997, she was sent by Sharkey to Blytheville, Arkansas, ahead of the rest of her gang. Plaintiff alleges that this assignment was discriminatory.

Plaintiff filed a second charge of discrimination with the EEOC on December 4, 1997. In this charge, Plaintiff complained that (1) she was denied a raincoat while male co-workers were provided with raincoats, (2) failure by Defendant to provide adequate bathroom facilities constituted discrimination, (3) she was forced to personally report to the roadmaster for time off, while her male co-workers were not required to do so, and (4) that the assignment to Blytheville was discriminatory and taken in retaliation for complaining about discrimination and harassment.

On December 11, 1997, after her gang had joined her in Blytheville, Arkansas, Plaintiff was suspended for insubordination. Plaintiff alleges that Mr. Sharkey told her to ride with James Key, foreman of a gang with which Gang 321 was working, to a job site. When Plaintiff went to Key's truck, he informed her that he was taking a different worker with him and that she should ride with Sharkey. Plaintiff alleges that when she returned to the office to relay this information to Sharkey, he again told her to go with Key. By that point, Key had left and Plaintiff was forced to stay with Sharkey. Sharkey alleges that Plaintiff simply refused to follow his instructions. Sharkey further contends that he contacted Brown about this incident and that Brown told him to suspend Plaintiff for insubordination. Brown denies that he ordered the suspension and that Sharkey suspended Plaintiff on his own initiative. Plaintiff was immediately suspended for insubordination. After a hearing into the matter, Plaintiff's suspension was dismissed and she was reinstated in January 1998 with full back pay.

At some point during this time period, Defendant made repairs and accommodations to the bathroom facility. However, Plaintiff was not aware of these changes.

On December 15, 1997, Plaintiff filed her third complaint with the EEOC, alleging that the December 11, 1997 suspension was in retaliation for complaining about discrimination and harassment.

On February 17, 1998, Plaintiff went on Medical Leave which was twice extended. When a third request for extension of the medical leave was not made at the expiration of the second extension, Defendant terminated Plaintiff's employment in December 1998.

Plaintiff filed a fourth charge with the EEOC on April 21, 1999, alleging that her termination was in retaliation for her previous complaints.

The EEOC issued Right to Sue letters on Plaintiff's four claims on May 24, 1999 and July 14, 1999. Plaintiff filed suit in this court on August 20, 1999, within 90 days of the earliest Right to Sue letter.

Discussion

A. *Summary Judgment Standard*

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," *id.* at 323, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. *See Emmons v. McLaughlin*, 874 F.2d 351, 353 (6th Cir. 1989). In considering a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v.*

Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

When confronted with a properly-supported motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246 (6th Cir. 1998). A genuine issue of material fact exists for trial "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

B. *Hostile Work Environment*

Title VII states, in relevant part: "[i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1). A plaintiff may establish a violation of Title VII by proving that the discrimination based on sex created a hostile or abusive work environment. *See Williams v. General Motors Corp.*, 187 F.3d 553, 560 (6th Cir. 1999). To prove a prima facie case of a hostile work environment based on sex, a plaintiff must establish the following five elements: (1) she is a member of a protected class; (2) she was subject to unwelcome harassment; (3) the harassment was based on her gender; (4) the harassment created a hostile work environment; and (5) the existence of employer liability. *See, e.g., Williams* 187 F.3d at 560-561; *Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir. 1999). A

hostile work environment plaintiff must also meet both a subjective and an objective test. "The conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive." *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1997) (citing *Harris v. Forklift Sys.*, 510 U.S. 17, 21-22 (1993)); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998), 118 S.Ct. 2275, 2283 (1998).

The first three elements of a prima facie case of a hostile work environment are easily met. Plaintiff is a female and is therefore a member of a protected class under Title VII. Defendant has not presented any facts to suggest that the acts, if true, were invited by the Plaintiff, so the second element is also met. The acts in question, if true, appear to be directly related to Plaintiff's gender.

In determining whether the alleged acts were severe or pervasive enough to create a hostile work environment, a court must use a "totality of the circumstances" approach. *See Williams*, 187 F.3d at 562. In such an approach, the proper perspective is a holistic one—one in which the alleged events must be taken in sum and not disaggregated and which considers "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's performance." *Harris*, 510 U.S. at 23; *see also Williams*, 187 F.3d at 562-64.

The proper analysis, when taking the facts in the light most favorable to the Plaintiff, must then consider that the Plaintiff was subject to discussion of her period in front of male co-workers, daily reminders of her foreman's belief that she should not be in her present job position because she is a woman, a request that she shine a flashlight upon a man while he is urinating, bathroom facilities that did not adequately protect her expectation of privacy, provision of raincoats to

co-workers while refusal to provide her with one, and non-consideration for overtime work. The recurrent nature of two of these events, the almost daily remarks by Joiner and the continual lack of overtime work, strengthen the hostile characteristic of the environment. A reasonable jury could objectively decide that these events gave rise to a hostile work environment.

The subjective element of the analysis is met since Plaintiff has on several occasions complained about the acts and sought redress through the EEOC and now the Court, in addition to Plaintiff's statements through the pleadings and her deposition.

The last element of a prima facie case of a hostile work environment is employer liability. The appropriate standard for determining employer liability depends upon whether the alleged harasser is a co-worker or supervisor. If a supervisor is involved, then it is not enough for an employer to take corrective action; employers have an affirmative duty to prevent sexual harassment by supervisors. *See Williams* 187 F.3d at 561. The Sixth Circuit has stated that "a supervisor is 'an individual who serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment.'" *Summerville v. Ross/Abbott Lab.*, 187 F.3d 638, 1999 WL 623786 at **7 (6th Cir. (Ohio))[1], quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994). This definition is in the disjunctive—a "supervisor" need only perform one of these duties. In the present case, a genuine issue of fact exists as to whether Joiner was a supervisor over the Plaintiff, especially as to whether a BNSF foreman could fire a track laborer and

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[1] Although citation to unpublished Sixth Circuit precedents is disfavored, this case is referred to in the absence of clear published case law from this Circuit "because it establishes the law governing the present action and 'there is no [Sixth Circuit] published opinion that would serve as well.'" *Norton v. Parke*, 892 F.2d 476, 479 n.7 (6th Cir. 1989).

to what extent a foreman controlled the conditions of work encountered by a track laborer. Since there is a genuine issue of fact on this point, summary judgment is inappropriate.

If a foreman at BNSF is in fact a supervisor, then Plaintiff must show that Defendant failed to take preventive measures to ensure that the workplace was free of harassment and discrimination. The record only indicates that Defendant took corrective, not preventive, measures.

The Court FINDS that there exists genuine issues of material fact which render summary judgment inappropriate on the hostile work environment claim.

C. *Retaliation*

Title VII prohibits retaliation against an employee "because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing," in connection with an unlawful employment practice. *See* 42 U.S.C. §2000e-3(a). A prima facie retaliation claim is established by showing the following:

> (1) that plaintiff engaged in an activity protected by Title VII;
>
> (2) that the exercise of [the plaintiff's] civil rights was known by the defendant;
>
> (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and
>
> (4) that there was a causal connection between the protected activity and the adverse employment action.

See Williams 187 F.3d at 568. The facts set forth above establish that Plaintiff had filed claims under Title VII and was thus engaged in protected activity. The record also

establishes that both Brown and Sharkey knew of Plaintiff's exercise of her rights.—

The third element of the prima facie case of retaliation requires that the employment action taken by the Defendant be "adverse." The Sixth Circuit has stated that "[i]n order to establish the existence of an adverse employment action, a plaintiff must show that he or she 'has suffered a materially adverse change in the terms or conditions of employment because of the employer's actions.'" *Summerville* at **8, quoting *Allen v. Michigan Dept. of Corrections*, 165 F.3d 405, 410 (6th Cir. 1999). The court continued, "[a]n adverse employment action must typically constitute a materially adverse change in the terms of employment such as 'termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'" *Summerville* 1999 WL 623786 at **8, quoting *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885-886 (6th Cir. 1996).

The Court reiterates that on summary judgment it must consider the facts in the light most favorable to the non-moving party. According to the Plaintiff, the change from forklift operator to actual work on the track constituted significant changes in her duties even though it did not constitute a formal change in job title or decrease in salary. Notably, working on the track involves physically-intense duties whereas operating a forklift involves significantly less physical duties. Specifically, the record indicates that the track laborers must carry heavy objects (e.g., heavy, cumbersome jacks that weigh approximately 110 pounds). Noting the evidence, the Court concludes that Plaintiff has met the burden of presenting evidence from which a jury could reasonably conclude that the change from forklift operator to working on the track was an adverse employment action.

Assuming *arguendo* that Defendant did take an adverse employment action against Plaintiff, liability may be avoided if Defendant can show a legitimate, non-retaliatory reason for the action. *See Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). On this point, Defendant asserts that its action resulted from complaints that a more senior employee should have the forklift operator position under the Collective Bargaining Agreement. This assertion is directly contradicted by Plaintiff's allegation that the Collective Bargaining Agreement does not cover the forklift operator position and by affidavits directly contradicting Defendant's assertion that several other employees had complained about Plaintiff holding the forklift position in lieu of a more senior employee. Spears Aff. at 2; Ellis Aff. at 1. Thus, the Plaintiff has presented sufficient evidence to create a genuine issue of material fact as to whether Defendant undertook the employment action for legitimate, nondiscriminatory reasons or the reasons proffered by Defendant are merely pretextual. Since this is a genuine issue of material fact, the Court FINDS that summary judgment on this point is inappropriate.

Plaintiff also claims that Defendant retaliated against her by wrongfully suspending her for insubordination. At the time Defendant took this action, it was aware that Plaintiff had filed complaints with the EEOC. Defendant does not raise an issue as to the adverse nature of this action. However, the Defendant does assert that the employment action occurred as the result of a legitimate, nondiscriminatory reason.

Once a defendant shows a legitimate, non-discriminatory reason for an employment action, the Plaintiff may show that the legitimate, nondiscriminatory reason offered by the Defendant is in fact pretextual and that the actual or overriding motivation for the action was retaliation. *See Canitia*, 903 F.2d at 1066. Plaintiff does allege that Defendant's proffered reason is pretextual and that the action was in fact

based upon her filed claims. Taking this in the context of all the alleged facts, Plaintiff has shown a genuine issue of material fact on this point.

Conclusion

For the reasons stated above, Defendant's Motion for Summary Judgment is DENIED.

Entered this 28 day of August 2000.

/s/ Jon P. McCalla
JON P. MCCALLA
UNITED STATES DISTRICT JUDGE

BNSF

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

2650 LOU MENK DRIVE
POST OFFICE BOX 961055
FORT WORTH, TEXAS 76161

[redacted] EXHIBIT 4-11-00 1

APPLICATION FOR EMPLOYMENT

It is the policy of the company as an Equal Opportunity Employer to assure that there shall be no discrimination against any employee or applicant for employment on the grounds of age, race, color, creed, religion, sex, national origin, disability or veteran status, or any other status protected by law.

PERSONAL DATA

COMPLETED AT (CITY)	STATE		DATE FILED (Mo., Day, Yr.)
Memphis	Tennessee		April 28, 1997
NAME (Last)	FIRST	INITIAL	SOCIAL SECURITY NUMBER
White	Sheila	D.	410-98-2932
HOME ADDRESS (Number & Street)	CITY	STATE	
3942 Maynard Dr.	Memphis	Tennessee	
ZIP CODE	HOME PHONE NO.	DAYTIME PHONE NO.	
38109	785-6080 or 785-6588	785-6588	

Are you 18 years of age or older? ☒ Yes ☐ No

Are you capable of performing the duties of the position applied for with or w/o reasonable accommodation? ☒ Yes ☐ No

Are you legally eligible for employment in this country? ☒ Yes ☐ No Proof of employment eligibility will be required upon employment.

Have you ever been convicted of a crime? (A conviction record will not necessarily bar applicant from employment.) ☐ Yes ☒ No

If yes, describe in detail: _____

How many days have you missed from work for any reason in the last two years? None

Have you ever been employed by a railroad? ☐ Yes ☒ No If yes, give name of railroad(s) _____

Position(s) held _____ When and where? _____

Reason for leaving _____

Do you have any relatives presently employed by BNSF? ☐ Yes ☒ No If yes,

EXHIBIT 5 99-2733 6-3-00

NAME:	RELATION:	JOB TITLE:	LOCATION:

POSITION

POSITION DESIRED:	SALARY EXPECTED:	WORK AVAILABILITY
Maint. of Way Labor	$ Open. MONTH	☒ FULL TIME ☐ PART TIME ☐ SHIFT WORK
ARE YOU WILLING TO TRAVEL? ☒ YES ☐ NO IF YES, ANY RESTRICTIONS?		CAN WE CONTACT YOUR PRESENT EMPLOYER FOR A REFERENCE? ☒ YES ☐ NO ☐ NA
ARE YOU WILLING TO RELOCATE? ☒ YES ☐ NO IF YES, ANY RESTRICTIONS? Do I have to?		

EMPLOYMENT HISTORY

	NAME OF EMPLOYER	TYPE OF BUSINESS	DATES	SALARY
PRESENT OR LAST EMPLOYER	Schering Plough.	Production		
	ADDRESS 3030 Jackson Ave.	PHONE NUMBER (901) 320-2011	FROM 1986	STARTING $7.75
	REASON FOR LEAVING Plant - Closing	DESCRIPTION OF JOB DUTIES Machine - Operator	TO 1996	ENDING $11.81
	SUPERVISOR & TITLE Roman Jackson Supvr	ARE YOU ELIGIBLE FOR REHIRE? ☐ YES ☒ NO		

A00101

BEST AVAILABLE COPY

			DATES	SALARY
2ND PREVIOUS EMPLOYER	Kimberly-Clark (901 Chelsea Div.)			
	ADDRESS 500 Mahannia Hwy. Memphis, Tenn.	PHONE NUMBER N/A	FROM 1985	STARTING $10.0
	REASON FOR LEAVING Close-Down	DESCRIPTION OF JOB DUTIES Machine-Operator	TO 1985	ENDING $10.31
	SUPERVISOR & TITLE Gus Williams	ARE YOU ELIGIBLE FOR REHIRE? ☐ YES ☒ NO		
3RD PREVIOUS EMPLOYER	NAME OF EMPLOYER	TYPE OF BUSINESS	DATES	SALARY
	ADDRESS	PHONE NUMBER	FROM	STARTING
	REASON FOR LEAVING	DESCRIPTION OF JOB DUTIES	TO	ENDING
	SUPERVISOR & TITLE	ARE YOU ELIGIBLE FOR REHIRE? ☐ YES ☐ NO		

EDUCATION

Type of School	Name & Location of School	Degree Earned	Major/Minor Fields of Study
High School Bus. Tech or Trade School	Fairley High, 4950 Fairyld. Memphis, Tenn.	yes Diploma)	
College(s)			
Other	N/A		

MILITARY SERVICE None

Branch	Date Entered	Date Discharged	Rank at Entry	Final Rank

Duties performed

Service schools or special experience N/A

Did you receive a dishonorable discharge? ☐ Yes ☐ No ☒ N/A

ADDITIONAL QUALIFICATIONS

Professional licenses, registrations or certifications N/A

Languages other than English and proficiency (1=Basic, 2=Working knowledge, 3=Advanced) N/A

List any additional skills or abilities you would like us to consider in evaluating your qualifications

Use of hands, heavy lifting, working with Jacket Hammers and other heavy machinery, all have worked in hot or cold weather, also hard hrs

Salary is of core importance to the success of duty by BNSF Employees. If hired, do you agree to learn and obey all safety rules relating to your job? Yes ☒ No ☐

It is the policy of the BNSF to help rehabilitate its injured employees so they can return to gainful employment. Do you agree, in the event you are injured while employed by the BNSF, or disabled for any reason, to cooperate with the doctors and rehabilitation agencies designated by the Company so they can help you return to gainful employment? Yes ☒ No ☐

I certify that all information given in this application has been carefully examined and is correct to the best of my knowledge and belief. I authorize investigation of all statements contained in my application for employment. I UNDERSTAND THAT MISREPRESENTATION OR OMISSION OF FACTS CALLED FOR HEREIN WILL BE SUFFICIENT CAUSE FOR CANCELLATION OF CONSIDERATION OF ANY EMPLOYMENT OR GROUNDS FOR DISMISSAL AT ANY TIME, REGARDLESS OF WHEN SUCH INFORMATION IS DISCOVERED. STATEMENTS IN THIS EMPLOYMENT APPLICATION ARE NOT TO BE CONSIDERED AS PART OF ANY CONTRACT OF EMPLOYMENT. I UNDERSTAND THAT BNSF HAS AN ARBITRATION POLICY AND THAT I MUST SUBMIT ANY DISPUTE OVER TERMINATION OF MY EMPLOYMENT OR MY EXEMPT STATUS TO ARBITRATION.

2. If an offer of employment is made, I consent to undergo any required medical examinations which are necessary as a condition of my initial employment, commencing employment and fitness for any other positions for which a determined disability is pre-existing. BNSF will provide qualified applicants and employees with disabilities reasonable accommodation(s) that do not impose undue hardship, or a direct threat to health or safety. I understand these medical examinations, including the pre-employment physical examination, include an alcohol and drug screen as part of its testing procedures and I have been informed of BNSF's drug and alcohol testing policy.

3. I agree to observe faithfully all applicable rules and regulations of the Company.

4. I agree, on behalf of myself, my heirs and personal representatives, that in the event of any claim or litigation involving this Company in which my records or physical conditions or [illegible] any physician, hospital, clinic, Veterans' Administration or other agencies may furnish to this company any facts or records concerning same, whether derived from confidential relations or otherwise, and I hereby ratify in any court in the same case, and I expressly waive the benefits of ANY State or Federal law which would such information is considered wholly or partially privileged.

5. I agree that my employment with BNSF is at will and may be terminated by me or BNSF at any time without notice, subject to any provisions of an applicable collective bargaining agreement.

6. THIS APPLICATION SHALL BE CONSIDERED ACTIVE FOR A PERIOD OF SIX (6) MONTHS FROM THE DATE OF FILING, AND IF I WISH CONSIDERATION AFTER THAT TIME IT WILL BE MY RESPONSIBILITY TO FILE A NEW APPLICATION. I UNDERSTAND THAT THIS APPLICATION IS NOT VALID WITHOUT MY SIGNATURE.

APPLICANT'S SIGNATURE Sheila D. White DATE April 28, 1997

DO NOT COMPLETE THIS SECTION

Applicant meets all of the qualifications for employment with The Burlington Northern and Santa Fe Railway Company and is approved for the following position.

Position	Department/Division	City, State	
Track Laborer	Southeastern Division	Memphis, TN	
Date Employed 06/23/97	Time Started	Salary/Wage	Disposition
Employing Officer's Signature		Title Employee Relation	Date 6/13/97

APR-28-1997 09:32 708 780 5180 98% A00102

AGREEMENT

Between
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY
and its employees represented by
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Effective August 1, 1978

* * * *

ARTICLE 11

Claims, Grievances and Discipline

Rule 90. Claim and Grievance Rule

(a) All claims or grievances shall be handled as follows:

(1) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

(2) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but his shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by

agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(3) The requirements outlined in Paragraphs (a) (1) and (2), pertaining to appeal by the employe and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within nine months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the nine months' period herein referred to.

(b) A claim may he filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

(c) This rule recognizes the right of representatives of the Organization, party hereto, to file and prosecute claims and grievances for and on behalf of the employes it represents.

(d) This agreement is not intended to deny the right of the employes to use any other lawful action for the settlement of claims or grievances provided such action is instituted within nine months of the date of the decision of the highest designated officer of the Carrier.

(e) This rule shall not apply to requests for leniency.

Rule 91. Discipline Rule

(a) Employes disciplined or dismissed will be advised of the precise charge of such action, in writing if requested.

(b) An employe who considers that he has been unfairly disciplined or dismissed, or who considers himself unjustly treated shall be entitled to the following handling of his complaint:

(1) The employe, or the General Chairman acting in behalf of the employe, shall make written request for an investigation to the employe's immediate supervisor. Such request shall be made within 15 days from date of discipline, dismissal or alleged unjust treatment.

(2) If a request for an investigation is made in compliance with requirements of paragraph (1) above, the employe shall be afforded a fair and impartial investigation. The investigation will be held within 15 days of the date of the request made by the employe or the General Chairman, unless a post-ponement is agreed upon by the Carrier and Organization representatives.

(3) The employe may be represented by duly accredited representative of the Brotherhood of Maintenance of Way Employes; and shall have the right to have present, without cost to the Carrier, such witnesses as he may desire.

(4) A copy of all statements taken at a completed investigation will be furnished duly accredited representative of employe. Employes, on request, will be given copy of their own statement upon verifying and signing same.

(5) A decision will be rendered by the Carrier within 10 days after completion of the investigation.

(6) If the charge against the employe is not sustained, it shall be stricken from the record. If by reason of such unsustained charge the employe has been removed from position held, reinstatement will be made and payment allowed for the assigned working hours actually lost while out of the service of the Carrier at not less than the rate of pay of position formerly held, or for the difference in rate of pay earned if in the service, less any amount earned in other employment.

(7) An employe dissatisfied with a decision will have the right to appeal in succession up to and including the highest officer designated by the management to handle such cases. The right of the employe to be assisted by duly accredited representatives of the employe is recognized.

(8) The provisions of Rule 90 will be applicable to the handling of appeals in discipline cases. No discipline case shall be considered unless the provisions of this Rule 91 (b) (1) and Rule 90 are complied with.

* * * *

BURLINGTON NORTHERN
Position Description

Position: Maintenance of Way Laborer

Date Prepared: January 26, 1993

Reports to:

Summary of Maintenance of Way Position:

The Maintenance of Way Laborer removes and replaces track components (e.g., ties, rails, bars, etc.) using various power and non-power hand tools. The Maintenance of Way Laborer may also lift and carry track material, cut brush, trees and vegetation, and clear the right-of-way of junk, litter, and cargo spillage.

Key Work Activities:

1. Inspects materials and equipment to determine if they are connected correctly and/or working correctly, before starting work.
2. Pulls spikes from tie.
3. Drills holes through rails for insertion of bolts, drives fastener (spikes, lags, etc.), tightens or loosens bolts.
4. Cuts rails.
5. Tamps track and manually tamps ballast.
6. Removes, installs, and moves ties.
7. Lifts, rolls, and adjust rails.
8. Removes and installs anchors.
9. Plugs spike holes.
10. Lifts and carries track material with assistance (e.g., spike cans, anchor bags, angle bats).
11. Removes and replaces ballast.

12. Sorts, segregates, and integrates materials for use with on-track machinery.
13. Cuts brush, trees, and vegetation.
14. Unloads, or assists in unloading ballast.
15. Clears right-of-way of junk, litter, and cargo spillage.
16. Operates non-power hand tools such as hammers, screwdrivers, files, wrenches, or pliers.
17. Operates large non-power tools such as shovels, picks, axes, cutters, or sledgehammers.
18. Operates proper electric, pneumatic, or hydraulic hand tools such as drills, impact wrenches, jacks, power saws, and grinders.
19. Uses specialized hand tools (e.g., four-ball spike, spike maul, track jack, claw bars, etc.).
20. Performs all qualified duties, as necessary or as requested by management.

Key Skill Requirements

1. Job requires ability to understand and comply with all company policies, procedures, and follow instructions, both orally and in writing, including company policies. Includes the ability to comply with all company safety practices, and apply on-the-job safety training to recognize and react to possible safety hazards.
2. Must demonstrate a teamwork orientation by displaying positive, friendly interactions with co-workers and supervisors.
3. Job requires ability to effectively communicate with co-workers and supervisors, both face-to-face and through communication devices, and a willingness to learn or be trained in all facets of the position.

4. Job requires ability to read in order to deal with various aspects of the job (i.e., instructions, safety instructions, book of rules and regulations).

5. Job requires ability to add, subtract, multiply, or divide whole numbers in order to deal with various aspects of the job (i.e., count ties, spikes, etc.)

6. Job requires travel to job sites around the country and remaining on-site for an extended period of time (sometimes days at a time), arid working variable hours, weekends, holidays, and overtime.

7. Job requires ability to work with little or no direct supervision.

8. Job requires ability to recognize and react to safety hazards.

9. Job requires ability to recognize audible signals and warnings.

10. Job requires ability to distinguish colors, signals, or signs.

11. Job requires ability to visually inspect work, materials or equipment and determine if it matches a "standard" or specification.

12. Job requires ability to react or respond quickly when the appearance of a stimulus requires the initiation of a response.

13. Job requires ability to judge distances or speeds.

14. Job requires ability to perform activities requiring the coordination of gross hand movements with visual information.

15. Job requires ability to maintain balance while working in or around moving equipment, on uneven terrain or on track ballast.

16. Job requires ability to lift or carry objects or materials weighing over 50 pounds.
17. Job requires ability to maintain a high level of muscular exertion for an extended period of time, involving the hands, arms, back or legs to lift, push, roll, or carry objects.
18. Job requires ability to make quick or repeated movements (bending, stretching, twisting, reaching) with arms, legs, or body.

Environmental Factors

1. Job involves working outdoors in a variety of weather conditions (e.g., heat, rain, wind, humidity, etc.).
2. Job requires working around moving or heavy equipment.
3. Job involves exposure to above normal noise level.

[BNSF LOGO]

Burnie D. Vaughn
Division Engineer

Burlington Northern Santa Fe
5280 Shelby Drive
Memphis, TN 38118

January 16, 1998

Mr. E.R. Spears-General Chairman BMWE
610 Woodruff Building
P.O. Box 50396
Springfield, Mo 65805-0396

Dear Mr. Spears:

Referring to investigation on Ms. S. D. White, SSN 410-98-2432, held on January 6, 1998, in Memphis, Tennessee, copy attached.

After careful review of the transcript of this investigation, the charges as read in the transcript are not sustained. Therefore, I have decided to reinstate Ms, White to her former position.

All back pay and time lost will be paid by the carrier. Also, all charges pertaining to this matter are hereby stricken from her personal record.

Ms. White will be reinstated to her position immediately.

Sincerely,

/s/ Burnie D. Vaughn
BURNIE D. VAUGHN

cc: Ms. S. D. White
Darryl Gabriel
M. J. Brown
K L. Parton—Labor Relations—Ft. Worth
Manpower Planning
Personal Records

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT COURT OF TENNESSEE
WESTERN DIVISION

No. 99-2733-MI

SHEILA WHITE,

Plaintiff,

vs.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

TRIAL PROCEEDINGS

BEFORE THE
HONORABLE JON PHIPPS McCALLA, JUDGE

SEPTEMBER 5, 2000

VOLUME IV

* * * *

[772] To establish the third element of her retaliation claim, the existence of an adverse employment taken, . . . the plaintiff must show that she suffered a material adverse change in the terms or conditions of employment because of the employer's actions.

In determining whether the plaintiff suffered a materially adverse change in the terms or conditions of her employment, you may consider the following:

1. Whether there was termination of employment.

2. Whether there was demotion, evidenced by a decrease in wage or salary.

3. Whether there was less—whether there was some less distinguished title.

4. Whether there was a material loss of benefits.

[773] 5. Whether there was significantly diminished material responsibilities.

6. Other indications that might be unique to a particular situation.

* * * *

AMICUS CURIAE BRIEF

(12)

FILED
MAR 9 - 2006
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No. 05-259

In the Supreme Court of the United States

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, PETITIONER

v.

SHEILA WHITE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a plaintiff who asserts a claim of retaliatory discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), must show that she suffered a materially adverse employment action.

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In the Supreme Court of the United States

No. 05-259

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, PETITIONER

v.

SHEILA WHITE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether an employee who asserts a claim of discriminatory retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), must show that she suffered a materially adverse employment action. The United States has a significant interest in the resolution of that question. The Attorney General is responsible for enforcing Title VII against public employers, and the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers. In addition, Title VII applies to the federal government as an employer. See 42 U.S.C. 2000e-16. The United States, as the principal enforcer of the civil rights laws and the Nation's largest employer, therefore has a strong interest in the fair and balanced enforcement of Title VII.

STATEMENT

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his * * * terms, conditions, or privileges of employment, because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). Title VII also makes it an unlawful employment practice for an employer "to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by [Title VII] * * * or because he has made a charge * * * under [Title VII]." 42 U.S.C. 2000e-3(a). This case involves the scope of the latter prohibition, which is known as Title VII's anti-retaliation provision.

1. In June 1997, petitioner Burlington Northern hired respondent Sheila White to work in its Maintenance of Way department at its Tennessee Yard in Memphis. Pet. App. 3a. Respondent's general job classification was "track laborer." J.A. 37. Marvin Brown, the roadmaster at the Tennessee Yard, assigned respondent to operate the forklift. Pet. App. 3a. Unlike most other track laborers, respondent therefore spent the bulk of her day operating the forklift. Respondent was the only female in the Maintenance of Way department. *Ibid.* Her immediate supervisor, foreman Bill Joiner, did not believe that it was appropriate for a woman to work in that department, and he repeatedly told her that. *Ibid.* According to respondent, several other employees also expressed their belief that women should not "work on a railroad." *Ibid.* Joiner, however, acknowledged that "White had no problems performing her job." *Id.* at 3a-4a.

On September 16, 1997, respondent complained to Brown that Joiner had been sexually harassing her. Pet. App. 4a. After an investigation, petitioner suspended Joiner for ten days and ordered him to attend a training session on sexual harassment. *Ibid.* Brown informed respondent about Joiner's discipline. *Ibid.* At the same time, he told her that he was reassigning her

from the forklift job to a "standard track laborer position." *Ibid.* Brown explained that other employees had objected to respondent operating the forklift instead of a more senior man because the forklift job was "less arduous and cleaner" than track work. *Ibid.* Respondent's pay and benefits remained the same, but the focus of her responsibilities became repairing railroad tracks. *Ibid.*; see Tr. Tran. 126-128 (respondent's testimony).

On October 10, 1997, respondent filed a charge with the Equal Employment Opportunity Commission (EEOC), claiming that petitioner had discriminated against her on the basis of sex and had retaliated against her for complaining about sexual harassment. Pet. App. 5a. On December 4, 1997, respondent filed a second charge with the EEOC, alleging retaliation on the ground that Brown had placed her under surveillance. *Ibid.*

On December 11, 1997, respondent was working with a regional tie gang under the supervision of Percy Sharkey, one of petitioner's foremen. Pet. App. 5a. Sharkey told respondent to ride with James Key, another foreman, and told Greg Nelson, another track laborer, to ride with him. *Id.* at 5a-6a. According to respondent, when she approached Key, he told her to ride with Sharkey, and then drove away with Nelson. *Id.* at 6a. According to Sharkey, respondent refused to ride with Key. *Ibid.* When Sharkey told Brown his version of events, Brown instructed Sharkey to remove respondent from service for insubordination. *Ibid.* That afternoon, Sharkey suspended respondent without pay. *Ibid.* Nelson, who had disobeyed Sharkey's instruction to ride with him, did not receive any discipline. *Ibid.*

Respondent filed a grievance with her union to challenge the suspension without pay, and she filed another charge of retaliation with the EEOC. Pet. App. 6a-7a. While the grievance was pending, respondent did not have a job or income. *Id.* at 7a. During that time, respondent sought medical treatment for emotional distress and incurred medical expenses. *Ibid.* On January 16, 1998—37 days after respondent's initial suspen-

sion—petitioner resolved respondent's grievance in her favor, and reinstated her with full back pay. *Ibid.*

2. After exhausting her administrative remedies with the EEOC, respondent filed suit in federal district court under Title VII, alleging that petitioner had subjected her to discrimination because of her sex and because she had opposed such discrimination. Pet. App. 7a. A jury trial was held at which the jury was instructed that, in order to prove actionable retaliation, respondent was required to show that she suffered a material adverse change in the terms or conditions of her employment. J.A. 63. The jury returned a verdict in respondent's favor on the discriminatory retaliation claim and a verdict in favor of petitioner on the sex discrimination claim. Pet. App. 7a. The jury awarded respondent $43,500 in compensatory damages. *Ibid.* The district court denied petitioner's motion for judgment as a matter of law on respondent's retaliation claim. *Id.* at 116a-126a.

3. A divided panel of the court of appeals reversed the district court's judgment on respondent's retaliation claim. Pet. App. 84a-115a. The panel held that neither the removal of respondent's forklift duties nor her 37-day suspension without pay was sufficiently adverse to give rise to a retaliation claim. *Id.* at 94a-104a. Judge Clay dissented. *Id.* at 105a-115a. In his view, the jury was entitled to find that respondent's "effective demotion [from forklift operator to standard track laborer] and subsequent suspension * * * constituted the requisite materially adverse employment action." *Id.* at 106a.

4. The court of appeals granted rehearing en banc, vacated the panel decision, and, in pertinent part, affirmed the district court's judgment on respondent's retaliation claim. Pet. App. 1a-83a. The court unanimously concluded that the removal of respondent's forklift duties and her suspension without pay both

constituted actionable discrimination under Title VII's anti-retaliation provision. *Id.* at 19a-25a, 35a, 50a.[1]

a. The court of appeals explained that, to establish a prima facie case of retaliation under Title VII, a plaintiff must show that she suffered an "adverse employment action." Pet. App. 8a-9a. The court then defined that term as "a materially adverse change in the terms of her employment." *Id.* at 13a (citation omitted). The court pointed to this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 761 (1998), where the Court stated that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." See Pet. App. 14a. The court rejected the EEOC's position that an "adverse employment action" in this context means "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity." *Id.* at 15a (quoting 2 EEOC Compl. Man. (CCH) § 8008, at 6512 (July 31, 1998)).

The court explained that the EEOC's standard was not supported by the language of Title VII's anti-retaliation provision. Pet. App. 16a. The court acknowledged that the EEOC's standard furthers that provision's purpose of ensuring that persons are not deterred from filing Title VII complaints. *Id.* at 17a. But it concluded that the materially adverse standard also furthers that purpose as well, while preventing lawsuits "based on trivialities." *Ibid.* The court also concluded that while the EEOC's standard requires case-by-case determinations, the materially

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[1] In its other primary ruling, the court of appeals held that the district court erred in instructing the jury on punitive damages and remanded the case for a new trial only on punitive damages. See Pet. App. 28a-34a. Judge Sutton —who agreed with the majority decision upholding the jury's verdict on respondent's retaliation claim—dissented with respect to the punitive damages issue. See *id.* at 50a-61a. The punitive damages issue is not before this Court.

adverse standard provides significant guidance on what actions "rise above the level of the trivial." *Ibid.* The court also explained that the EEOC's position would require the application of different "discrimination" standards to retaliation claims and other Title VII claims, even though Title VII uses the same "discriminate against" language for both kinds of claims. *Ibid.*

b. Applying the "materially adverse employment action" standard, the court of appeals held that respondent's 37-day suspension without pay was actionable. Pet. App. 19a-24a. The court rejected petitioner's contention that respondent's reinstatement with full back pay precluded such a finding. *Ibid.* The court reasoned that Title VII does not limit prohibited retaliation to ultimate employment decisions. *Id.* at 22a. The court also concluded that petitioner's position would conflict with Title VII's make-whole purposes because it would preclude an employee who has been wrongfully suspended from recovering either interest on back pay or damages for emotional suffering. *Id.* at 23a. The court also explained that petitioner's position was at odds with decisions of this Court holding that a statute of limitations runs from the time an unlawful act has occurred and is not tolled during a grievance process. *Ibid.*

The court also concluded that removing respondent's forklift duties and reassigning her to standard track duties qualified as a materially adverse employment action. Pet. App. 25a. The court explained that "the forklift operator position required more qualifications"; "the forklift operator position was objectively considered a better job"; and, "[i]n essence, as the district court found, the reassignment was a demotion." *Ibid.* The court also stated that the track laborer position was "more arduous and 'dirtier'" than operating the forklift. *Ibid.*

c. Judge Clay filed a concurring opinion in which four other judges joined. Pet. App. 35a-50a. He would have adopted the EEOC's standard for proving a retaliation claim, *i.e.*, "an employer's retaliatory action is sufficiently adverse for § 704(a) pur-

poses if it would be 'reasonably likely to deter [employees] from engaging in protected acvtivity.'" *Id.* at 35a (quoting *Ray* v. *Henderson*, 217 F.3d 1234, 1242-1243 (9th Cir. 2000)). Applying that standard, Judge Clay concluded that the removal of respondent's forklift duties and her suspension constituted adverse actions that were actionable under Title VII. *Id.* at 50a.

SUMMARY OF ARGUMENT

Title VII's anti-retaliation provision (Section 2000e-3(a)) adopts the same threshold requirement for discrimination as the Act's core prohibitions. Applying settled principles, Section 2000e-3(a) should be interpreted in context and in light of the Act's overall structure. In the preceding provisions of the Act, Title VII describes in detail the "[u]nlawful employment practices" that employers, employment agencies, labor organizations, and training agencies may not take on the basis of race, sex, or another prohibited factor. 42 U.S.C. 2000e-2. As to employers, the Act provides that an employer may not rely on such prohibited characteristics, *inter alia*, "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). The Act uses different language to impose comparable prohibitions on employment agencies, labor organizations, and training agencies. When read in context, the natural inference is that Congress used the phrase "discriminate against" in Section 2000e-3(a) as a short hand for employment practices that would be unlawful if done on account of race, sex, or another prohibited factor. Section 2000e-3(a) thus creates an additional basis for unlawful discrimination, but does not create a different or more expansive concept of discrimination than the Act's core prohibitions.

That interpretation of Section 2000e-3(a) creates a uniform discrimination standard for Title VII that sets the bar at the level Congress deemed appropriate to deter outright discrimination. Conduct that does not give rise to an actionable violation of Title

VII's primary prohibitions on discrimination on the basis of race or sex should not give rise to a claim for retaliation.

To prove actionable discrimination under Title VII's anti-discrimination provisions (including Section 2000e-3(a)), a plaintiff must show that she has been subjected to a materially adverse employment action, *i.e.*, a materially adverse change in the terms, conditions, or privileges of employment. That standard dovetails with the standard that this Court adopted in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), for describing a "tangible employment action" that would subject an employer to vicarious liability for sexual harassment committed by one of its supervisors. The Court stated that a "tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. In addition, the Court drew support for that definition from lower court case law applying the materially adverse employment action standard. *Ibid.* *Ellerth* also reaffirmed that a "hostile work environment" that is based on "a showing of severe or pervasive conduct" likewise "constitutes a change in the terms or conditions of employment that is actionable under Title VII," *id.* at 753-754, and thus constitutes a materially adverse employment action.

The court of appeals correctly held that a jury was entitled to find that each of the retaliatory acts at issue constitutes a materially adverse employment action and, therefore, actionable discrimination under Title VII. Respondent's 37-day suspension without pay represented a significant change in her employment status. The fact that she was later reinstated with back pay affects the appropriate remedy for a retaliatory suspension, but does not eliminate the initial discrimination. Likewise, respondent's reassignment from operating a forklift to repairing railroad tracks constitutes a materially adverse action because a jury could reasonably find that it represented a significant

change in her responsibilities, even though her job title remained the same. Indeed, the court of appeals stated that the "forklift operator position required more qualifications," and that the reassignment was tantamount to a "demotion." Pet. App. 25a.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT WAS SUBJECTED TO ACTIONABLE DISCRIMINATION UNDER TITLE VII'S ANTI-RETALIATION PROVISION

A. Title VII's Anti-Retaliation Provision Should Be Read *In Pari Materia* With Title VII's Core Prohibitions

Title VII's anti-retaliation provision makes it unlawful "for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. 2000e-3(a). The basic question presented by this case is what discrimination is actionable under Section 2000e-3(a). When Section 2000e-3(a) is read, as it must be, in context and in light of Title VII's surrounding provisions and its broader function as a prohibition against *employment* discrimination, the statute's reference to "discriminat[ion]" naturally incorporates the same threshold underlying Title VII's core anti-discrimination prohibition (*i.e.*, Section 2000e-2). Thus, where an employer's act would constitute actionable employment discrimination if done on account of an employee's race, sex, or other prohibited factor, Section 2000e-3(a) makes it actionable if done on account of a Title VII charge or other protected activity.

1. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989). Thus, Title VII, "like every Act of Congress, should not be read as a

series of unrelated and isolated provisions," but rather as "a symmetrical and coherent regulatory scheme." *Gustafson* v. *Alloyd Co*, 513 U.S. 561, 570 (1995). See also *FTC* v. *Mandel Bros.*, 359 U.S. 385, 389 (1959) (statutory provisions should be read so that they fit into "an harmonious whole"). The "discriminat[ion]" referred to in Title VII's anti-retaliation provision therefore must be interpreted in light of the Act's surrounding provisions, and not as an unrelated or isolated term.

In the provisions preceding Title VII's anti-retaliation provision, Title VII sets out in elaborate detail the "unlawful employment practice[s]" that employers, employment agencies, and labor organizations may not take against individuals because of their "race, color, religion, sex, or national origin." See 42 U.S.C. 2000e-2(a)-(d). In particular, an employer may not use those prohibited characteristics "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). The subsequent provisions of Section 2000e-2 likewise detail the practices in which employment agencies and labor organizations may not engage based on those prohibited characteristics. 42 U.S.C. 2000e-2(b) (employment agencies); 42 U.S.C. 2000e-2(c) (labor organizations). In addition, Section 2000e-2 further defines the kind of actions that the statute does and does not treat as unlawful employment discrimination based on race, color, religion, sex, and national origin. 42 U.S.C. 2000e-2(e)-(n).

Section 2000e-3(a)—entitled "Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings"—must be read in light of these preceding provisions. Particularly when read in that light, the natural inference is that Congress used the phrase "discriminate against" as shorthand for the employment practices that it had previously identified as unlawful, if taken on the basis of race, color, religion, sex, or national origin. That is consistent with the way that this Court

has interpreted Title VII. In *Jackson* v. *Birmingham Board of Education*, 125 S. Ct. 1497 (2005), the Court not only recognized that Title VII is distinct from other civil rights statutes in that it "spells out in greater detail the conduct that constitutes discrimination in violation of that statute," but it referred by shorthand to "the conduct that constitutes discrimination in violation of [Title VII]" as the conduct defined in the Act as "unlawful employment practices." *Id.* at 1505.

The inference that Congress intended Section 2000e-3(a) to cover the same type of discriminatory conduct barred by Section 2000e-2 is particularly strong because the anti-retaliation provision uses the terms "unlawful employment practice," and "discriminate," both of which are used repeatedly throughout Title VII's core prohibitions in Section 2000e-2. See *e.g.*, 42 U.S.C. 2000e-2(a), (b), (c), and (d). That common usage is a specific manifestation of Congress's intent to tie the scope of the retaliation prohibition to Title VII's core prohibitions. See *Gustafson*, 513 U.S. at 568. The inference that Congress intended Section 2000e-3(a) to be read in *pari materia* with Section 2000e-2 is further strengthened by the fact that Section 2000e-3(a) refers to each of the principal types of employment groups that are separately addressed in Section 2000e-2(a)-(d), *i.e.*, employers, employment agencies, labor organizations, and training programs. Without repeating the more detailed language of those sections, Section 2000e-3(a) adds participation in Title VII's remedial process as a forbidden basis for discrimination of the specific forms made relevant to employers, employment agencies, labor organizations and training programs respectively.

Conversely, reading Section 2000e-3(a)'s reference to "discriminate against" to cover *any* kind of discrimination (*i.e.*, differential treatment) would improperly fail to account for the fact that Congress used that phrase in a statute that is explicitly addressed to *particular* types of discrimination—*i.e.*, the employment-related discrimination specified in Section 2000e-2,

the immediately preceding provision. Cf. *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 545 (2002) ("With respect to *dismissals* the tolling provision covers, one could read § 1367(d) in isolation to authorize tolling regardless of the reason for dismissal, but § 1367(d) occurs in the context of a statute that specifically contemplates only a few grounds for dismissal"); *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-346 (1976) (provision stating without qualification that an order remanding a case is not appealable is to be read *in pari materia* with the preceding subsection and is therefore limited to the kinds of remand orders set out in that subsection).

Title VII's anti-retaliation provision thus creates an additional protected class (*i.e.*, employees who engage in a protected activity), but not a different or more expansive concept of discrimination than the statute's basic anti-discrimination provision. Section 2000e-2—the Act's core anti-discrimination provision—prohibits an employer from discriminating against an employee on account of race, sex, or another prohibited factor. And Section 2000e-3(a)—the anti-retaliation provision—prohibits an employer from discriminating against an employee for filing a charge or engaging in other protected activity. Thus, an employer could not fire, dock in pay, or subject an employee to a hostile work environment because of her sex, and it could not do so because she *charged* discrimination on account of sex either. But while Section 2000e-2 and 2000e-3(a) prohibit different bases for discrimination, the "quantum of discrimination" that is actionable under both provisions is "coterminous." *Jensen* v. *Potter*, 435 F.3d 444, 448 (3d Cir. 2006) (opinion by Alito, J.).

The anti-retaliation provision bars discrimination against persons who engage in the specified forms of protected activity to the same extent that it bars intentional discrimination against employees because of their race, color, religion, sex, or national origin. That means that an employer may not discriminate against an employee because he has engaged in an activity pro-

tected by the anti-retaliation provision if that discrimination affects the employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-(2)(a)(1). Likewise, an employer may not on account of such protected activity subject an employee to harassment that is severe or pervasive enough to alter the terms or conditions of employment by creating a hostile work environment. See *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 133 (2004); *Jensen*, 435 F.3d at 448-449.[2]

That *in pari materia* approach is consistent with the basic reality that Title VII is an *employment* discrimination statute. Although Congress could have prohibited all retaliation by employers, even against non-employee witnesses, it clearly chose to limit Section 2000e-3(a) to discrimination by an employer against "employees or applicants for employment." Just as Congress chose to limit the class of Section 2000e-3(a) plaintiffs to the same basic universe as Section 2000e-2 plaintiffs, it makes sense to read the type of employment actions covered by Section 2000e-3(a) as parallel to those covered by Section 2000e-2.

2. Interpreting Section 2000e-3(a)'s reference to "discrimi-

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[2] Section 2000e-2(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive" the employee "of employment opportunities or otherwise adversely affect his status as an employee" on account of the employee's race, sex, or another prohibited factor. 42 U.S.C. 2000e-2(a)(2). Some courts have held that the anti-retaliation provision incorporates that discriminatory practice as well, see, *e.g.*, *Robinson* v. *City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997), and that conclusion is consistent with an *in pari materia* construction of the Act. However, given the nature of a retaliation claim, an employee who alleges retaliation based on the kind of discrimination covered by Section 2000e-2(a)(2) would be required to establish an intentional act. See *Jackson*, 125 S. Ct. at 1504 ("Retaliation is, by definition, an intentional act."); *Jensen*, 435 F.3d at 449 n.2. Moreover, the vast majority of cases in which the question presented has arisen have involved alleged retaliatory discrimination that falls into the category of Section 2000e-2(a)(1). Because that is true of this case, the Court need not decide whether Title VII's anti-retaliation provision authorizes a claim based on an alleged disparate-impact covered by Section 2000e-2(a)(2).

nate against" to incorporate the same employment practices covered by Title VII's basic anti-discrimination provision promotes consistency because it would establish a uniform standard for determining whether an employment practice is actionable under Title VII. Cf. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998) ("[W]e think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment."). Furthermore, interpreting Section 2000e-3(a) to adopt the same "discrimination" threshold as the Act's basic anti-discrimination provision promotes the balance that Congress struck in Title VII between preventing pernicious discrimination in the workplace and "prevent[ing] Title VII from expanding into a general civility code." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); see *Faragher*, 524 U.S. at 787. Likewise, this interpretation promotes Congress's intent to ensure that employees may invoke statutory remedial mechanisms, see *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997), because it sets the bar for establishing actionable discrimination on account of filing a Title VII charge at the same level that Congress deemed appropriate to deter outright discrimination on account of race, sex, or another prohibited factor.

A contrary conclusion would attribute to Congress an intent to afford employees *greater* protection from protected activity discrimination than from intentional discrimination based on race, color, religion, sex, or national origin. Although Congress could certainly create such a hierarchy, there is no reason to assume lightly that Congress would have such an intent. As pernicious as retaliatory behavior is, discrimination against an employee because of her race or sex is no less pernicious. Indeed, retaliation is prohibited in the statute to further the statute's *primary* prohibition on discrimination against race, sex, religion, or national origin. There is certainly no reason to conclude that Congress believed that the trigger set by Section 2000e-2 for actionable discrimination on account of race or sex

was too forgiving to root out discrimination on account of filing a Title VII charge. See *Von Gunten* v. *Maryland*, 243 F.3d 858, 863 n.1, 865 (4th Cir. 2001) ("Congress has not expressed a stronger preference for preventing retaliation under § 2000e-3 than for preventing actual discrimination under § 2000-2.") (citation omitted).[3]

In enacting Title VII, Congress granted American employees broad-based protection against discrimination based on personal characteristics, such as race and sex. See *Oncale*, 523 U.S. at 78 (Section 2000e-2(a) "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment") (citation omitted). In Section 2000e-3(a), Congress sought to give employees who file a charge or engage in other protected activity that same level of protection.[4]

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[3] Congress knows how to decouple a retaliation provision from the more basic prohibition in an anti-discrimination statute. For example, in enacting the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, Congress not only prohibited "discriminat[ing]" against a disabled individual because he filed a complaint about disability discrimination, 42 U.S.C. 12203(a) (entitled "Retaliation"), but it also separately provided that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any individual" for exercising any right granted by the ADA, 42 U.S.C. 12203(b) (entitled "Interference, coercion, or intimidation"). Under such a provision, it is enough for a claimant to allege "interference, coercion, or intimidation" without having to allege separately that an employer's action constituted "discrimination" as that term is used in the Act's core prohibitions.

[4] In guidance issued in 1998, the EEOC stated that Title VII's anti-retaliation provision reaches "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." 2 EEOC Compl. Man. (CCH) § 8008, at 6512 (July 31, 1998). Under that test, which has both an objective and a subjective component (see *Vasquez* v. *County of Los Angeles*, 349 F.3d 634, 646 (9th Cir. 2003)), the anti-retaliation provision's threshold for discrimination is potentially more expansive than the threshold for the Act's core prohibitions. The Ninth Circuit has adopted the 1998 EEOC guidance, see *ibid.*, and the EEOC filed an amicus brief below advocating that view. Two other circuits have adopted a purely objective test which applies the anti-retaliation provision

B. The Principal Arguments For Interpreting The Anti-Retaliation Provision More Expansively Than Title VII's Core Prohibitions Are Unpersuasive

The lower courts and dissenting judges that have rejected the foregoing interpretation and concluded that Title VII's anti-retaliation "discrimination" threshold is more expansive than the threshold for the Act's core prohibitions have relied on three principal considerations. None is persuasive.

1. First, because Section 2000e-(3)(a) does not repeat the language "terms, conditions, or privileges of employment," which appears in Section 2000e-2(a)(1), the concurring judges below drew the conclusion that Section 2000e-(3)(a) was intended to cover "*any* form of discrimination." See Pet. App. 36a, 37a (Clay, J., concurring) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

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to action that is reasonably likely to deter. See *Rochon* v. *Gonzales*, No. 04-5278, 2006 WL 463116, at *8 (D.C. Cir. Feb 28, 2006) (plaintiff must show that the "'employer's challenged action would have been material to a reasonable employee,' which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Washington* v. *Illinois Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005)). In practice, the results under the various formulations may not vary greatly. Nonetheless, for the reasons explained in the text above, the *in pari materia* approach advocated above is the better reading of the statute. If this Court disagrees, it should, at a minimum, follow the lead of the Seventh and District of Columbia Circuits and adopt a purely objective version of the "reasonably likely to deter" test. A subjective element injects unpredictability and administrative difficulties into the inquiry. In the First Amendment retaliation context (where courts are not bound by the text of any statutory provision), the majority of courts have adopted an analogous "deter a person of ordinary fitness" test that is purely objective. See *Bennett* v. *Hendrix*, 423 F.3d 1247, 1251-1254 (11th Cir. 2005), petition for cert. pending, No. 05-989 (filed Feb. 6, 2006). For all the reasons stated in Part D below, an affirmance would be required under the reasonably likely to deter standard as well.

The "disparate inclusion" principle articulated in *Russello* is just one tool of statutory construction, not an inexorable command. It is therefore inapplicable when there is an alternative explanation for the difference in wording or more persuasive evidence of congressional intent. See *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432-437 (2002); *Thermtron*, 423 U.S. at 345-346. Both are present here. First, because Section 2000e-3(a) prohibits retaliation in conjunction with the various forms of conduct separately addressed in subsections 2000e-2(a)-(d) treating employers, employment agencies, labor organizations, training programs, respectively, the omission of the "terms, conditions, or privileges" phrase was integral to a formulation that avoided restating much of the text in the preceding subsections of 2000e-2.

More broadly, as discussed in Part A above, the surrounding provisions and overall structure of the Act; the common use of the terms "unlawful employment practice" and "discriminate"; and the anomaly of concluding that Congress intended to adopt a narrower discrimination threshold standard under the Act's core prohibitions lead to the conclusion that Congress intended for the anti-retaliation provision to be coterminous in scope with Title VII's core prohibitions. Moreover, interpreting Section 2000e-(3)(a) to cover "*any* form of discrimination," Pet. App. 36a (Clay, J., concurring) (emphasis added), would greatly expand the reach of Title VII, including to acts outside the employment context. As discussed next, that result would be at odds with Title VII's explicit focus on "employment practices" and "employees."

2. Second, an argument has been made that tying the anti-retaliation provision to the scope of the core prohibitions would exclude non-employment-related acts of retaliation and thereby undermine the purpose of the anti-retaliation provision. That is incorrect. Precisely because the anti-retaliation provision exists to further the basic prohibitions in Section 2000e-2, it makes little

sense to conclude that Congress intended to make it harder to make out a claim of discrimination under the Act's core prohibition than under the anti-retaliation provision.

Title VII's discrimination threshold is tied to employment-related practices, and that squares with the text of the Act and its overall structure and objectives. See *Nelson* v. *Upsala Coll.*, 51 F.3d 383, 387 (3d Cir. 1995) ("In view of Congress's objective in enacting Title VII, it is not surprising that cases dealing with unlawful retaliation under Title VII typically involve circumstances in which the defendant's conduct has impaired or might impair the plaintiff in employment situations.") (citing cases). Indeed, Title VII's anti-retaliation provision is explicitly defined as "an unlawful employment practice." 42 U.S.C. 2000e-3(a). In addition, the Act's basic prohibitions are explicitly tied to "employment practice[s]" as well. See 42 U.S.C. 2000-e(2). As that statutory language shows, Congress simply did not adopt an all-purpose prohibition against any conduct that might deter the filing of a complaint or the other protected activities; rather, it limited the Act's core prohibitions as well as its anti-retaliation provision to *employment-related* misconduct. That is hardly surprising in a statute's whose objective was "to achieve equality of employment opportunities." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971). Furthermore, when Congress wants to enact a broad-based anti-retaliation provision that extends beyond a civil rights law's basic prohibition, it knows how to do so. See, *e.g.*, 42 U.S.C. 12203(b), discussed note 3, *supra*. Cf. *Whitfield* v. *United States*, 543 U.S. 209, 217 (2005).

Other features of the anti-retaliation provision confirm that it is limited to employment-related conduct. By its terms, the anti-retaliation provision protects only "applicants for employment" and "employees." 42 U.S.C. 2000e-3(a). Thus, if an employer acted against a non-employee witness (for example, by cancelling an independent contractor's contract), that witness would not have a cause of action under the anti-retaliation provision. Similarly, the anti-retaliation provision governs only the

conduct of employers, employment agencies, joint labor-management committees, and labor organizations. *Ibid.* Accordingly, the anti-retaliation provision would not forbid a person that did not meet that description, such as a former co-worker, from taking an adverse action against an employee who filed a Title VII charge. As those examples illustrate, "no legislation pursues its purposes at all costs, * * * and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987).

Furthermore, the fact that Title VII's anti-retaliation provision—just like the Act's core prohibitions—is limited to employment-related actions does not mean that the victims of non-employment related misconduct are without a remedy. For example, if an employer engages in wrongful misconduct against an employee or potential witness outside of the employment relationship, the victim often may be able to assert a state-law cause of action. See *Nelson*, 51 F.3d at 388.[5]

3. The third argument against treating the scope of the retaliation provision as coterminous with the scope of Title VII's core prohibitions is that there may be employment-related actions that would deter an employee from charging discrimination, but would not be viewed as affecting the terms, conditions, or privileges of employment. See *Herrnreiter* v. *Chicago Hous. Auth.*, 315 F.3d 742, 746 (7th Cir. 2002), cert. denied, 540 U.S. 984

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[5] It is clear that Title VII's federal employer provisions do not extend beyond the employment practices addressed in the Act's basic prohibitions. Section 2000e-16(a) provides that "personnel actions affecting" federal government employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin." That provision has been interpreted to prohibit retaliatory discrimination, see, *e.g.*, *Hale* v. *Marsh*, 808 F.2d 616, 619 (7th Cir. 1986); *Ayon* v. *Sampson*, 547 F.2d 446, 449-450 (9th Cir. 1976), and because there is a single prohibition on discrimination (without a separate anti-retaliation provision), the federal government's potential liability under Title VII and its wavier of sovereign immunity are limited to retaliation that rises to the level of a "personnel action," *i.e.*, an action relating to the terms, conditions, or privileges of employment.

(2003). That argument is tantamount to a policy objection to the line drawn by Congress for the statute's core anti-discrimination prohibition. As discussed above, Title VII proscribes a broad array of employment-related practices, but Congress stopped short of making any workplace interaction a basis for a potential lawsuit. See *Oncale*, 523 U.S. at 80. Moreover, the argument is based on the premise that Congress intended to adopt a broader concept of actionable discrimination to protect employees when discrimination is based on protected conduct than when discrimination is based on race or sex. Balancing the competing concerns of rooting out discrimination and keeping litigation within appropriate bounds, Congress declined to adopt an "any differential treatment" standard under Title VII's basic prohibition for discrimination on account of race, sex, or another prohibited factor. Neither the Act nor its objectives supports the contention that Congress believed that employees should enjoy greater protection when it came to the complementary prohibition against retaliation.

Furthermore, there is no evidence that the existing anti-retaliation provision has failed to encourage employees to file Title VII charges or otherwise engage in protected conduct. To the contrary, retaliation filings nearly doubled from 1992 to 2005 and a quarter of all Title VII charges now include claims of retaliation. See EEOC, *Charge Statistics FY 1992 Through FY 2005* (last modified Jan. 27, 2006) <http://www.eeoc.gov/stats/charges.html.> In any event, this is a policy determination for Congress. If Congress were to determine that a lower discrimination threshold were necessary to ensure that employees took advantage of remedial mechanisms, it could enact such a threshold. But, as currently enacted, Title VII is best read as establishing the same threshold for both outright discrimination and retaliation claims.

C. Like Title VII's Core Prohibitions, The Anti-Retaliation Provision Proscribes Any Discrimination That Amounts To A Materially Adverse Employment Action

Title VII adopts the same threshold for discrimination on the

basis of engaging in protected activity under Section 2000e-3(a) that it does for direct discrimination under Section 2000e-2: to prevail, a plaintiff must show that she has been subjected to a materially adverse employment action.

1. To establish a prima facie case of retaliation under Title VII, a plaintiff must demonstrate that "(1) she engaged in protected conduct under Title VII; (2) she suffered an adverse employment action; and (3) the adverse action was causally connected to the protected activity." *Marrero* v. *Goya of P.R., Inc.*, 304 F.3d 7, 22 (1st Cir. 2002). As the Third Circuit has explained, in developing the adverse employment action requirement, "[c]ourts have operationalized the principle that retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." *Robinson*, 120 F.3d at 1300. Numerous circuits, including the court of appeals below, have thus held that an employee must show a materially adverse change in the terms, conditions, or privileges of employment to satisfy the adverse action element of the prima facie case. See Pet. App. 13a, 18a.[6]

2. That approach squares with this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). In *Ellerth*, the Court held that an employer may be vicariously liable for sexual harassment committed by a supervisor when the supervisor "takes a tangible employment action against the subordinate." *Id.* at 760. The Court explained that a "tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. Moreover, the Court drew support for "[t]he concept of a tangible employment action" from case law applying the materially adverse employment ac-

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[6] See also, *e.g.*, *Fairbrother* v. *Morrison*, 412 F.3d 39, 56 (2d Cir. 2005); *Marrero*, 304 F.3d at 23-27; *Von Gunten*, 243 F.3d at 866; *Gupta* v. *Florida Bd. of Regents*, 212 F.3d 571, 587-588 (11th Cir. 2000), cert. denied, 531 U.S. 1076 (2001); *Ribando* v. *United Airlines, Inc.*, 200 F.3d 507, 510-511 (7th Cir. 1999); *Robinson*, 120 F.3d at 1300.

tion standard. *Ibid.* (citing, *e.g.*, *Crady* v. *Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)).

The Court explained that "[a] tangible employment action in most cases inflicts direct economic harm," *Ellerth*, 524 U.S. at 762, and that a tangible employment action may include "a discharge, demotion, or undesirable reassignment," *id.* at 765. In addition, the Court contrasted case law in which courts had concluded that an employee's "bruised ego" or "reassignment" without any materially significant disadvantage did not constitute actionable discrimination. See *id.* at 761 (citing *Flaherty* v. *Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994); *Kocsis* v. *Multi-Care Mgmt., Inc.*, 97 F.3d 876 (6th Cir. 1996); *Harlston* v. *McDonnell Douglas Corp.*, 37 F.3d 379 (8th Cir. 1994).

Ellerth also resolved the rule of vicarious liability that applies to sexual harassment committed by a supervisor that does not result in a tangible employment action. After reaffirming that a plaintiff in such a case must show that the supervisor's actions are sufficiently "severe or pervasive," to constitute a "hostile work environment," 524 U.S. at 754, the Court adopted the following rule of vicarious liability for such cases: An employer is liable for the supervisor's conduct, unless it establishes as an affirmative defense "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765.

Thus, *Ellerth* recognizes two types of discrimination under Title VII's core prohibition: (1) "tangible employment actions," with respect to which the "employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII"; and (2) a "hostile work environment" that is based on "a showing of severe or pervasive conduct" and thus "constitute[s] discrimination in the terms or conditions of employment." 524 U.S. at 753-754. A plaintiff who can show that she has been subjected to either type of employer-related conduct has suffered a materially adverse employment action that,

if done on account of the filing of a Title VII charge or other protected activity, would constitute actionable discrimination under Section 2000e-3(a). See Pet. App. 14a (relying on *Ellerth* in explaining materially adverse employment action standard).[7]

3. The materially adverse employment action test not only follows the path marked by *Ellerth*, but provides a workable, objective, and uniform standard for adjudicating both direct discrimination and retaliation claims under Title VII. Under the materially adverse action standard, an employer's conduct must cause "objectively tangible harm" to be actionable, and thus "[p]urely subjective injuries, such as dissatisfaction with a reassignment, * * * public humiliation or loss of reputation" would not qualify as a matter of law. *Forkkio* v. *Powell*, 306 F.3d 1127, 1130-1131 (D.C. Cir. 2002). Such purely subjective injuries do not alter the terms and conditions of employment, and thus, would not qualify as actionable discrimination under Section 2000e-2(a)(1). In addition, a subjective standard would be more difficult to apply and could produce different results from the same action depending on the idiosyncracies of a particular plaintiff.[8]

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[7] Because *Ellerth* resolved only the question of when an employer is vicariously liable for sexual harassment committed by a supervisor outside the scope of his employment, it did not necessarily resolve the full substantive reach of Title VII's core prohibitions. Nevertheless, the Court's decision furnishes an instructive description of the type of employment-related discrimination that is actionable under Title VII. As explained in Part D below, the discriminatory acts found by the jury in this case constitute tangible employment actions and, therefore, satisfy the materially adverse action test.

[8] The objective nature of the inquiry is consistent with the lower court case law cited in *Ellerth*. See 524 U.S. at 761. For example, in *Flaherty*, the court of appeals observed that "a plaintiff's perception that a lateral transfer would be personally humiliating is insufficient, absent other evidence, to establish a materially adverse employment action." 31 F.3d at 457; see also *Kocsis*, 97 F.3d at 886 (noting that an employee's change in title would not be materially adverse where there was no significant change in responsibilities). The test that this Court applies in determining whether an employee has been subjected to a hostile work environment incorporates a subjective component, in that—in

D. The Court Of Appeals Correctly Held That The Retaliatory Acts At Issue Constitute Actionable Discrimination

The court of appeals held that the jury was entitled to find that each of the discriminatory practices at issue in this case constitute materially adverse employment actions that are actionable under Section 2000e-3(a). That conclusion is supported by the record and the reasonable inferences that a court is required to draw from the evidence in favor of the non-movant (here, respondent) in reviewing a motion for judgment as a matter of law. See *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); Pet. App. 8a.

1. Respondent's 37-day suspension without pay clearly constituted a tangible employment action that significantly changed her employment status. For 37 days, respondent was not permitted to work, she was denied any pay or benefits, and she did not know when, if ever, she could return to work. See Pet. App. 6a, 111a, 119a. For those 37 days, there was unquestionably a significant change in respondent's employment status. Although respondent was later reinstated with back pay, that affects only the appropriate remedy for the retaliatory suspension. See *id.* at 23a. It does not change the fact that respondent's employment status was significantly altered during the 37-day suspension. The suspension without pay therefore constituted a materially adverse employment action that is actionable discrimination under Title VII.

Petitioner also contends (Br. 33-38) that the suspension was not an official company act for which it is vicariously liable under this Court's decisions in *Ellerth* and *Suders*. That is incorrect. As discussed, *Ellerth* held that an employer is vicariously liable for the act of a supervisor when the supervisor takes a tangible employment action against a subordinate. 524 U.S. at 760. In

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addition to proving an "objectively hostile or abusive work environment"—a plaintiff must prove that she "subjectively perceived the environment to be abusive." See *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). However, even in that context, an allegation of subjective injury is insufficient, standing alone, to establish an actionable claim of discrimination under Title VII.

Suders, the Court reaffirmed that a company may be held vicariously liable for the "tangible employment actions" of supervisors. 542 U.S. at 144. Under *Ellerth* and *Suders*, because the action of the supervisor who suspended respondent without pay was a tangible employment action that could only have been taken by a supervisor, petitioner is vicariously liable for that suspension.

Petitioner also contends (Pet. 34) that it is not liable for the tangible action of suspending respondent without pay because its collective bargaining agreement makes the initial suspension tentative. But under *Ellerth*, an employer's vicarious liability for the act of a supervisor does not depend on whether a collective bargaining agreement characterizes a supervisor's tangible employment action as an action of the company, or whether that tangible action is said to be tentative or final. Instead, as a matter of law, if an action taken by a supervisor rises to the level of "a tangible employment action," it "becomes for Title VII purposes the act of the employer." 524 U.S. at 762. That understanding is consistent with this Court's statement in *Suders* that a "tangible employment decision * * * may be subject to review by higher level supervisors." 542 U.S. at 144-145 (citation omitted).[9]

The contention that an employer may avoid liability by labeling a supervisor's decision tentative and subjecting it to internal review also cannot be reconciled this Court's statute-of-limitations cases. Those cases hold that Title VII's statute of limitations begins to run when a discriminatory act occurs and that a discriminatory act is not rendered nonfinal by a mechanism for

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[9] Nor is there any force to petitioner's argument (Br. 38) that respondent should be denied a complete remedy under Title VII in order to promote the primacy of grievance procedures made available through collective bargaining. Because Congress expressly intended for Title VII remedies and grievance procedures under a collective bargaining agreement to be independent remedies, the Court long ago rejected the argument that it should qualify Title VII's protections in light of such grievance procedures. *International Union of Elec. Workers* v. *Robbins & Myers*, 429 U.S. 229, 235-238 (1976); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 52, 54 (1974).

internal review. See *International Union of Elec. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 234 (1976); *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 261 (1980). Indeed, in *Robbins & Myers*, 429 U.S. at 234, the Court rejected the argument that an employee's termination was not "final" until the conclusion of an internal grievance process, explaining that the employee "stopped work" the day she was fired and "ceased receiving pay and benefits as of that date." Likewise, in *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 110 (2002), the Court stated that "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.'"

Petitioner argues (Br. 36) that Congress could not have intended a suspension without pay to be actionable when an employer reinstates the employee with backpay on the ground that there was no relief in that situation before the 1991 Amendments to Title VII. That is incorrect. Before 1991, a plaintiff in such a case could have sought interest for the time backpay was withheld, *Loeffler* v. *Frank*, 486 U.S. 549 (1988), and an injunction to "bar like discrimination in the future." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). Moreover, the 1991 Amendments reflect Congress's judgment that previous remedies were inadequate and that permitting victims of employment discrimination to recover compensatory relief for harm caused by an unlawful employment practice is necessary to further Title VII's deterrent and make-whole purposes. If employers were permitted to avoid liability for the tangible employment actions of their supervisors, that congressional judgment would be thwarted.

Petitioner asserts (Br. 39-40) that its supervisors must have authority to suspend without pay employees who violate work and safety rules. But employers also need the authority to fire and demote employees, and no one would argue that such actions are not covered by Title VII. Nothing in Title VII removes a supervisor's authority to suspend without pay (or fire or demote). Rather, Title VII limits a supervisor's authority to suspend an employee without pay (or fire or demote) only when the supervisor does so because of a prohibited factor, such as race, or for having engaged in a protected activity. When, as here, a supervi-

sor nonetheless suspends an employee without pay on one of those prohibited grounds for a significant period of time, Title VII, as interpreted in *Ellerth*, makes the employer liable.

2. Although it is a closer question, the court of appeals also properly concluded that a reasonable juror could have found respondent's transfer from her forklift duties to be a materially adverse employment action. Pet. App. 25a.

The general rule is that "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." *Brown* v. *Brody*, 199 F.3d 446, 455-456 (D.C. Cir. 1999) (internal quotation marks omitted). But substance does matter. Even when a transfer does not result in a change in pay or benefits, courts have recognized that it may amount to a materially adverse employment action when it entails a "significant change in job responsibilities," or significantly different working conditions such that a reassignment in form, is a demotion in substance. *Forkkio*, 306 F.3d at 1131; see *Jones* v. *District of Columbia Dep't of Corrs.*, 429 F.3d 276, 281 (D.C. Cir. 2005) (jury may find actionable discrimination based on such a transfer if plaintiff establishes "some other *materially adverse* [employment] *consequence*") (citation omitted); *Von Gunten*, 243 F.3d at 868 ("If the change in [the plaintiff's] job assignment truly had been significant, * * * then her contention would have merit."); *Kocsis*, 97 F.3d at 886 (employee did not suffer a "materially adverse employment action" where she enjoyed the same pay and benefits and "her duties were not materially modified"); *Harlston*, 37 F.3d at 382 (same). Likewise, in *Ellerth* this Court specifically recognized that an employee's "reassignment with significantly different responsibilities" constitutes a "tangible employment action." 524 U.S. at 761, 765.

Viewing the facts in the light most favorable to respondent, a reasonable juror could have found that she suffered a materially adverse employment action when petitioner changed her duties from operating the forklift to a standard track laborer position. The court of appeals stated that "the forklift operator position required more qualifications." Pet. App. 25a. In addi-

tion, testimony in the record indicated that "the forklift job was not merely an occasional task; it was an actual job which, according to Roadmaster Brown's own testimony, was advertised to the railroad employees." *Id.* at 106a (Clay, J., dissenting from panel decision). Thus, the court of appeals stated that, "[i]n essence, as the district court found, the reassignment was a demotion." *Id.* at 25a; see *id.* at 106a-107a (Clay, J., dissenting from panel decision) ("[Respondent], in effect, experienced not a mere 'lateral transfer,' * * * but a demotion"). As such, a reasonable juror could have found that, while respondent's pay, benefits, and job title remained the same, she was subjected to a "significant change in job responsibilities" (*Forkkio*, 306 F.3d at 1131).

Petitioner contends (Br. 25) that respondent was not reassigned at all, because respondent remained in the Maintanence of Way position to which she had been initially assigned, and the job description for that position included track laborer duties. That argument should be rejected. Just as the fact that an employee's pay and benefits remain the same does not automatically lead to the conclusion that she has not suffered a materially adverse employment action, the fact that her position or job description remains the same does not inevitably lead to that conclusion either. Rather, as discussed, an employee may establish a materially adverse employment action by proving that she has been subjected to a "significant change in job responsibilities." *Forkkio*, 306 F.3d at 1131. Nor does it matter (Pet. Br. 28-29) that during the period of her assignment to forklift duties, respondent sometimes performed track work. A jury could find that she suffered "a significant change in [her] job responsibilities," and thus actionable discrimination, when her primary responsibilities changed from operating a forklift to manually repairing railroad tracks.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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